					QNNO	100	"	Oxonian
					ROMK	100	"	
5	April	49,070.90	4	July	QLJK	100	"	Virginie
	"	48,126.—		"	SJOB	100	"	Atlantian
					SXWZ	100	"	
	"	49,966.80		"	SWZX	100	"	Atlantian
					QMPO	100	"	Texas
	"	24,966.—		"	RIFC	100	"	"
	"	48,988.35		"	RYWV	100	"	Atlantian
					REJO	100	"	Oxonian
					SWIO	100	"	"
7	"	49,030.70	6	"	QCCD	100	"	"
					RYAK	100	"	"
	"	48,989.40		"	QINS	100	"	"
					RCOP	100	"	"
	"	23,125.50		"	SEFG	100	"	St-Laurent
	"	24,590.80		"	RXPN	100	"	Texas
13	"	24,346.15	12	"	HOWD	100	"	Candidate
	"	25,023.90		"	QGHI	100	"	Oxonian
14	April	49,183.90	13	"	LEDT	100	34	Candidate
					LACO	100		Lagician
							66	Candidate
	"	24,598		"	QNBC	100	Bales	Oxonian
15	"	47,775.20	14	"	SBBC	100	"	"
					SCCD	100		"

EXHIBIT No. 5.

Statement of Steele, Miller & Co.'s Drafts, Accepted by the Comptoir d'Escompte de Mulhouse for Account of Scheuch & Co. Prior to September 1st, 1909.

Dates of Acceptance	Amount	Falling Due	Marks	No. of Bales	S/S
			HLCK	100 Bales	Atlantian
16 April	72,471.—	15 July	HOPA	100	"
			HRKQ	100 "	Verginie
26 "	25,510.80	25 July	LEXT	100	Atlantian
11 May	53,929.85	9 Aout	RQQR	100	St-Laurent
			QARE	100	"
"	55,792.30	"	QELO	100	Oxonian
			QNZP	100	St-Laurent
"	28,266.85	"	REAA	100	"
26 "	55,218.45	24 "	RGFX	100	Honduras
			QITQ	100	
"	27,704.80	"	QAMQ	100	Oxonian
1245					
1909					
25 May	27,430.35	23 Aout	RZXW	100 Bales	Texas
" "	27,472.55	"	RKMP	100	Virginie
1 June	28,161.35	30 "	RICK	100	"
7 "	58,142.—	5 September	RRRO	100	Honduras
			RKII	100	Virginie

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	"	85,809.90		"	RCCD	100		Virginie
					QQID	100		Texas
					QBOT	100		"
10	"	28,315.35	8	"	RAEE	100		French Line
	"	58,151.40		"	ROAT	100		Virginie
					REEK	100		Honduras
	"	29,130.75		"	QALL	100		Texas
14	"	112,273.05	12	"	SSIN	100		"
					STIZ	100		"
					SKPQ	100		"
					SOTT	100		"
	"	28,826.70		"	RNOE	100		Honduras
15	"	58,126.40	13	"	RPPU	100		
					RIOW	100		Bordeaux
					RKON	100		Honduras
16	"	86,868.25	14	"	SITO	100	48	Hondures
					SOAA	100	52	Virginie
					QRRK	100		Virginie
17	"	85,880.35	15	"	QZRO	100		"
					QIKX	100		Texas
21	"	56,910.20	19	"	SREP	100		"
					SOAB	100		"
"	"	57,003.50		"	ROAC	100		"
					RRKA	100	98	Texas
							2	Bordeaux

EXHIBIT No. 5.

Statement of Steele, Miller & Co.'s Drafts, Accepted by the Comptoir d'Escompte de Mulhouse for Account of Scheuch & Co. Prior to September 1st, 1909.

Dates of Acceptance	Amount	Falling Due	Marks	No. of Bales	S/S
June	84,946.30	September	R A P C	100 Bales	
			S O A C	100	Texas
			S X Z X	100	
22 "	28,182.45	20 "	S H H O	100	"
"	28,199.—	"	R I T E	100	Bordeaux
"	56,420.10	"	S B E T	1000 66 B/	Texas
			R I O W	100 34	Bordeaux
			Q E E B	50	Texas
23 "	56,413.80	21 "	R I N E	50	
			R A E K	100	
			S K I A	100	Texas
1 July	84,801.75	29 "	R Z Z X	100 87	Bordeaux
			R K O Z	100 13	Texas
31 "	28,160.55	29 October	S O A T	100 50 B/	Texas
				50	Bordeaux

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Statement of Steele, Miller & Co.'s Drafts Accepted by the Comptoir D'Escompte de Mulhouse from the 1st of September, 1909, to the 10th of May, 1910.

1909								
5	October	32,689.20	3	January	R V C F	100	Bales	St. Laurent
"	"	32,733.15		"	R X V D	100		Virginie
7	"	33,251.80	5	"	Q I B S	100		Virginie
"	"	33,066.10		"	Q A V V	100		Californian
"	"	33,162.70		"	Q T O M	100		Virginie
"	"	32,939.30		"	Q R U G	100		Californian
"	"	32,762.70		"	R N V A	100		Louisiane
"	"	16,603.50		"	R Z S E	50		Californian
12	"	33,732.40	10	"	Q W D I	100		Mexico
"	"	33,108.40		"	R G P L	100		Guyane
"	"	33,094.55		"	Q E V A	100		Mexico
"	"	33,602.80		"	Q U A C	100		"
"	"	26,153.30		"	R N I P	80		Bordeaux
"	"	33,905.70		"	R O B I	103		Chicago
"	"	33,110.35		"	R H O X	100		Mexico
13	"	33,374.35	11	"	Q O D P	100		Californian
"	"	33,088.20		"	R I U C	100		Mexico
"	"	33,447.20		"	Z W I N	100		"
"	"	33,032.70		"	R E X Y	100		"
19	"	33,524.35	17	"	Q E Z I	100		Guyane

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EXHIBIT No. 6.

Statement of Steele, Miller & Co.'s Drafts Accepted by the Comptoir D'Escompte de Mulhouse from the 1st of September, 1909, to the 10th of May, 1910.

19	Octeber	36,067.55	January	R I K S	100		Virginie
"	"	35,725.25	"	Q A I N	100		"
"	"	36,360.80	"	Q O K S	100		"
"	"	35,855.20	"	R V O Y	100		"
"	"	36,246.30	"	Q V C A	100		Louisiane
"	"	34,900.90	"	R H L E	100		Guatemala
1247	1909.						
19	October	34,645.65	17 January	Q H I C	100	Bales	Guatemala
"	"	34,788.35	"	R N E L	100	"	"
"	"	34,561.15	"	Q S B M	100	"	Virginie
"	"	35,533.60	"	Q I E S	100	"	"
"	"	35,172.45	"	R W B D	100	"	Guatemala
"	"	35,307.75	"	R Y W P	100	"	Virginie
"	"	35,171.05	"	R X Y S	100	"	"
"	"	35,316.60	"	R Q A G	100	"	Louisiane
"	"	35,612.25	"	Q U L I	100	"	Virginie
"	"	34,347.90	"	R B E I	100	"	Mexico
"	"	34,705.15	"	R S J P	100	"	Honduras
"	"	35,026.40	"	Q E C H	100	"	"
"	"	34,908.30	"	R C N A	100	"	Virginie
20	"	33,469.40	18 "	Q A N Y	100	"	Louisiane

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"	"	33,105.55	"	"	R Q C D	100	"	Guatemala
21	"	6,692.10	19	"	R I N P	20	"	Black Prince
"	"	35,456 35	"	"	R A Q W	100	"	Louisiane
"	"	36,792.30	"	"	Q X O P	100	"	"
25	"	26,574.95	23	"	R W H A	75	"	"
"	"	8,875.45	"	"	"	25	"	"
"	"	26,638.20	"	"	R E W Z	75	"	"
"	"	9,149.—	"	"	"	25	"	"
"	"	33,914.75	"	"	V U R	100	"	Virginie
"	"	33,740.40	"	"	L E R	100	"	"
"	"	36,415.15	"	"	R I S A	100	"	Louisiane
"	"	33,966.55	"	"	N I Q	100	"	Virginie
"	"	33,949.50	"	"	W Y R	100	"	Guatemala
"	"	34,551.20	"	"	M O Q	100	"	"
26	"	17,607.20	24	"	R A O T	50	"	French Line
"	"	35,564.55	"	"	R Z A Y	100	"	Meltonian
"	"	35,427.50	"	"	S Z K A	100	"	Louisiane
1248	1909.							
26	October	35,281.45	24	January	S Q N E	100	Bales	Asian
"	"	35,359.—	"	"	S T C H	100	"	"
"	"	36,153.75	"	"	R R S T	100	"	Dictator
"	"	36,302.—	"	"	R W W A	100	"	Asian
27	"	35,544.55	25	"	R F F G	100	"	Virginie
"	"	35,736.30	"	"	Q Q B K	100	"	"
"	"	36,558.60	"	"	R X Y D	100	"	Kingstonian
"	"	35,701.50	"	"	R B L U	100	"	Virginie

EXHIBIT No. 6.

Statement of Steele, Miller & Co.'s Drafts Accepted by the Comptoir D'Escompte de Mulhouse from the 1st of September, 1909, to the 10th of May, 1910.

27	October	35,734.75	25	January	Q E Q Q	100	Bale.	"
"	"	35,506.50	"	"	R R R K	100	"	Memphian
"	"	35,856.35	"	"	R L I N	100	"	Virginie
"	"	35,863.60	"	"	R L E N	100	"	"
"	"	35,840.60	"	"	R P Q Q	100	"	Guatemala
"	"	36,416.95	"	"	R P U I	100	"	Virginie
"	"	36,177.55	"	"	R V A M	100	"	Kingstonian
29	"	35,641.55	27	"	R M M W	100	"	Virginie
"	"	35,728.—	"	"	Q Q E Z	100	"	Guatemala
"	"	35,677.30	"	"	R L S E	100	"	Virginie
"	"	35,913.—	"	"	R H A G	100	"	"
"	"	36,531.30	"	"	Q E H O	100	"	Guatemala
30	"	36,626.75	28	"	R O M E	100	"	Virginie
"	"	35,736.15	"	"	R G G F	100	"	"
"	"	35,467.—	"	"	R M O Z	100	"	Mexico
"	"	36,201.15	"	"	R U E Z	100	"	Dictator
"	"	35,553.20	"	"	S R Y P	100	"	"
"	"	36,218.50	"	"	R U L X	100	"	Memphian.
"	"	36,137.95	"	"	R K E P	100	"	Virginie
"	"	35,648.25	"	"	R I A T	100	"	"
"	"	36,696.—	"	"	Q O M Y	100	"	Memphian

" "	35,480.70	" "	SFOA	100	"	Virginie	
" "	36,845.75	" "	QDOF	100	"	"	
1249 1909.							
30 October	35,163.25	28 January	SROX	100	Bales	Irishman	
" "	36,090.40	" "	RADF	100	"	Virginie	
" "	37,156.25	" "	QEZT	100	"	Guatemala	
" "	36,779.60	" "	RHUX	100	"	Memphian	
" "	36,230.05	" "	RPKT	100	"	"	
" "	36,151.65	" "	RURT	100	"	"	
" "	36,650.30	" "	QUTH	100	"	"	
" "	36,163.80	" "	RBYN	100	"	Virginie	
" "	35,415.65	" "	RELI	100	"	"	
" "	35,527.55	" "	QAQQ	100	"	"	
" "	36,048.70.	" "	QERT	100	"	"	
2 November	36,332.75	31 "	RNUG	100	"	Memphian	
4 "	36,261.05	2 February 1910	RLER	100	"	"	
" "	35,439.85	" "	ROMA	100	"	"	
" "	36,390.80	" "	RYNA	100	"	"	
" "	36,326.60	" "	RHER	100	"	"	
" "	36,895.25	" "	QUTE	100	"	Konakay	
" "	36,336.70.	" "	RAND	100	"	Memphian	
" "	36,255.80	" "	RAWK	100	"	"	
" "	38,049.50	" "	RMEM	100	"	"	
5 "	37,991.05	3 "	QOBI	100	"	"	
9 "	36,094.25	7 "	RJQV	100	"	Konakay	

1251 United States District Court, Eastern District of Louisiana, New Orleans Division.

J. A. E. Pyle, Trustee,
vs. No. 14,240.
Texas Terminal & Transport Company, et als.

Exhibits offered in connection with deposition of Emile Level, filed October 24, 1911, in the case bearing above title and numbered 14241 of the docket of the said Court.

At the execution of a commission for the examination of witnesses in a case depending in the District Court of the United States for the Eastern District of Louisiana, wherein J. A. E. Pyle is complainant, and the Texas Transport and Terminal Company, et als., are defendants, these exhibits 1 to 13 were produced and sworn to by Emile Level and subscribed by him at the time of his examination.

(Signed) JOHN PRESTON BEECHER,
[Seal] Vice Consul of the United States and Commissioner.
(Signed) E. LEVEL.

Exhibits numbered 9, 10, 11, 12, and 13, being draft, through bill of lading, custody bill of lading, insurance certificate, and invoice, omitted per instructions.

* * * * * * * *

1260 United States District Court, Eastern District of Louisiana, New Orleans Division.

J. A. E. Pyle, Trustee,
vs. No. 14,277.
Texas Transport & Terminal Company, et als.

Deposition of Jules Castel, Taken Under Commission Issued Out of the Clerk's Office of the United States District Court for the Eastern District of Louisiana, on July 17th, 1911, in the Above Entitled and Numbered Cause, on Behalf of the Credit Havrais, One of the Defendants Herein. Offered and Filed November 20th, 1911.

1261 Interrogatory No. 1:

Please state your name, age, residence and occupation. How long have you been engaged in your present occupation?

To the first interrogatory he saith:

My name is Castel (Jules). I am sixty-three years old. My residence is in this city, 8 Glaciere Street. I entered in the Credit Havrais on second of January, one thousand eigh' hundred and sixty-five, as bookkeeping clerk. I was named cashier in the year 1880; attorney in the year 1891; and finally the first of July, 1908, the Board of Administration appointed me as delegated manager, charged with the management, which functions I am actually occupying.

Interrogatory No. 2:

Do you know the Credit Havrais, a defendant in the above entitled cause? If so, state whether or not it is an incorporated institution. In what country was it incorporated? What is the nature of its business? In what place or places has it a business domicile? What is its capital?

To the second interrogatory he saith:

The Credit Havrais is a bank establishment, established as per contract passed before Marcel, Esquire, notary in Havre, on the fifth of July, 1864, with a nominal capital, of Frs. 8,000,000" (eight million francs); the head office is situated in Havre, Boulevard de Strasbourg, Nr 79.

EXHIBIT No. 6.

Statement of Steele, Miller & Co.'s Drafts Accepted by the Comptoir D'Escompte de Mulhouse from the 1st of September, 1909, to the 10th of May, 1910.

10 November	33,579.30	8 February	HIZ	100	Bales	Virginie
22 December	39,032.40	22 March	RGPE	100	"	Tampican
" "	39,325.45	" "	RVEN	100	"	"
" "	38,799.80	" "	SGRI	100	"	"
" "	38,925.10	" "	RDAT	100	"	Virginie
" "	38,341.50	" "	SREG	100	"	"
" "	38,733.70	" "	RHIK	100	"	Tampican
" "	39,020.05	" "	RDEF	100	"	"
" "	38,380.75	" "	SRIL	100	"	"
" "	38,604.55	" "	RHTU	100	"	Honduras
27 "	39,155.85	27 "	RTAG	100	"	Tampican
28 "	38,719.75	28 "	RDEM	100	"	"
1250 1909.						
28 December	39,480.90	8 March	RACR	100	Bales	Virginie
" "	38,786.55	" "	STAO	100	"	Tampican
" "	38,873.60	" "	RGYR	100	"	"
" "	38,645.40	" "	SPUT	100	"	Honduras
29 "	38,361.85	29 "	SCRE	100	"	Tampican
" "	38,644.90	" "	STAG	100	"	Virginie
" "	38,884.30	" "	RDIT	100	"	Tampican
" "	39,006.15	" "	RTNS	100	"	"

"	"	38,706.60	"	"	RBAC	100	" Honduras
12 February 1910		37,155.—	13 May		QWDN	100	" Louisiane
12	"	36,962.30	"	"	SOBI	100	" "
"	"	37,240.40	"	"	QUET	100	" "
"	"	37,097.55	"	"	RBTR	100	" Guatemala
"	"	37,181.60	"	"	QRAN	100	" Louisiane
"	"	38,148.45	"	"	RSPC	100	" Texas
16	"	38,970.70	"	"	RHGA	100	" "
"	"	39,564.65	"	"	ZBTK	100	" "
"	"	39,559.75	"	"	RSTE	100	" French Line
18	"	39,479.25	19	"	QOJL	100	" Texas
16	"	38,571.80	17	"	QASP	100	" Louisiane
"	"	38,354.40	"	"	QERC	100	" Texas
"	"	37,353.35	"	"	SPRD	100	" "
14	"	37,520.75	15	"	RAIL	100	" "
"	"	37,773.80	"	"	RSKX	100	" Louisiane
"	"	38,589.05	"	"	RMVO	100	" Tampican
"	"	37,857.—	"	"	QMPA	100	" Texas
"	"	38,100.75	"	"	RFIJ	100	" Louisiane
"	"	38,104.70	"	"	RCON	100	" Tampican
"	"	38,176.25	"	"	RMIS	100	" Texas

Exhibit No. 6.

According to the paragraphs numbers 1 and 9 of the article fifth of the statutes, the operations of the Societe consist especially:

"To discount all commercial drafts on France and foreign countries, warrants or securities' bills, letters of Bottomry loan, and in general all kinds of engagements at fixed maturities resulting from commercial or industrial transactions, to negotiate and to rediscount the above mentioned values after having indorsed same; to issue and to accept any 1262 drafts and letters of exchange, etc."

"Finally, to do, in general, all operations of a banking firm, viz., in France or in foreign countries."

Interrogatory No. 3:

Are you connected with the Credit Havrais? If so, in what capacity and for how long? State generally the nature and scope of your duties.

To the third interrogatory he saith:

No contract is engaging me with the Credit Havrais, my functions shall last all the time which may please to the Council of Administration to continue to me its confidence.

My quality of delegated manager, charged with the direction, explains sufficiently the nature and object of my functions.

Interrogatory No. 4:

If, in answer to previous interrogatories, you have said that the Credit Havrais was engaged in the banking business in Havre, France, state how long it has been so engaged, and state in a general way the nature and extent of such business. Did it include the furnishing and advancing of funds for the purchase of cotton and the taking and holding of the title to said cotton?

To the fourth interrogatory he saith:

To be conform with its statutes and settlements, the Credit Havrais did not, since its foundation, do anything but bank business in Havre, which according to its regular progress presented, in 1910, a general movement of Frs. 1,625,307,446.55, as it is proved by the copy of the report of exercise 1910, which I annex to the present deposition, as exhibit under number 1.

One of the most important branches of operations of the Credit Havrais consist to make advances of moneys to its customers, or to accept for their account letters of exchange drawn against documents or merchandises, which
1263 constitute a guarantee that the Credit Havrais detain until the definite settlement of its advances.

Interrogatory No. 5:

Do you know the firm of Scheuch and Company of Havre, France? How long have you known said firm? Who are the individual members thereof? State, if you know, the business in which said firm was engaged during the time you have known it.

To the fifth interrogatory he saith:

I know the firm of Scheuch & Co., since its foundation, in Havre in 1901.

Its partners are:

Ferdinand Scheuch.

Albert Schilling.

These gentlemen are trading here, as merchants and agents, importing cotton and representing American cotton shippers.

Interrogatory No. 6:

State, if you know, the general reputation enjoyed by said firm at Havre for business integrity and fair dealing from the time you first knew it down to and including May 7, 1910. State, if you know, its general reputation, during the same period, as to its solvency and financial responsibility. What sort of credit did it have at Havre?

To the sixth interrogatory he saith:

The partners have been always considered as honorable, active, and intelligent in business.

After having started in 1901 with a capital of fifty thousand francs the said partners possessed in 1909-1910 a fortune estimated to seven hundred and fifty thousand francs, which amount was considered sufficient to guarantee the final outturn of the business treated for their account; consequently they had a good credit.

1264 Interrogatory No. 7:

How was said firm regarded during said period as

to its financial responsibility and business integrity by the Credit Havrais and yourself? State whether or not during said period you became aware of anything which gave you cause to doubt the solvency or honesty of said firm.

To the seventh interrogatory he saith:

The business transacted by the Credit Havrais for account of the firm of Scheuch & Company having been always punctually settled, never I have had the least doubt about the solvency or honesty of said firm.

Interrogatory No. 8:

During said period did your firm have any business arrangements or dealings with the said Scheuch and Company? If yes, please give a clear, full statement setting forth such business arrangements or dealings.

To the eighth interrogatory he saith:

It was in October, 1905, that the business relations began between the firm of Scheuch & Company and the Credit Havrais, and these relations continued every year during cotton seasons.

They consisted invariably in authorizations given verbally to Scheuch & Company, to draw on the Credit Havrais, by their friends of America, for the counter-value of a certain quantity of cotton determined each time.

Interrogatory No. 9:

If, in answer to previous interrogatory, you have stated that the Credit Havrais authorized Scheuch and Company to have drafts drawn on said bank by that firm's American customers for the purchase price of cotton, state, if you have not already done so, whether the arrangement provided
1265 that such drafts should always be accompanied by documents which would give the bank title to the cotton described in the draft.

State whether or not the Credit Havrais would have authorized the drawing of said drafts or would have accepted the same if it had not believed that on acceptance it acquired title to and possession and control of the cotton described in the drafts.

What arrangement, if any, did the said bank have with

Scheuch and Company in respect to the sale of futures in connection with the drawing or acceptance of any such drafts? Explain in whose names futures were sold and what was the purpose of such sale of futures.

To the ninth interrogatory he saith:

It was formally agreed that the drafts drawn on the Credit Havrais ought to be accompanied by the documents relating to the cotton, of which they were the counter-value, and these documents, or the cotton itself, after landing, were remaining in the possession of the Credit Havrais as a title of guarantee until the settlement of its acceptances.

Never, the Credit Havrais would have authorized the said drawing if it would have suspected, only for one instant, that the documents which were remitted to it, did not constitute a sure guarantee of the settlement of its acceptances.

With regard to the sales of "futures" passed to the Caisse d Liquidation, in the name of the Credit Havrais, for quantities of cotton equivalent to the number of bales of which the counter-value was drawn on the bank, this measure constituted a precaution against the fluctuations of prices which could have happened at the moment of realizing the cotton.

Interrogatory No. 10:

State whether or not the Credit Havrais had any interest in or knowledge of the contracts or arrangements between Scheuch and Company and the shippers of the cotton
1266 covered by such drafts.

State whether or not the said bank extended or intended to extend any credit to said shippers of the cotton.

To the tenth interrogatory he saith:

The Credit Havrais had no interest and did not know the conditions of the contracts or arrangements passed between Scheuch & Company and the shippers of the cotton covered by the drafts.

Operating for account of Scheuch & Company, the bank had not to examine if it was convenient to extend the credit to said shippers of cotton and consequently, never had the intention to allow the least credit to said shippers of cotton.

Interrogatory No. 11:

Do you know the firm of Steele, Miller and Company or any

of its individual members? What is the nature or extent of your acquaintance with said firm or its individual members?

To the eleventh interrogatory he saith:

I know the firm of Steele, Miller & Co., but I know none of its members individually. And this knowledge is relating, only, to the advices of drafts that the said firm was sending to the Credit Havrais when it was drawing for value of the cotton shipped by order and for account of Scheuch & Company.

Interrogatory No. 12:

While the arrangements aforesaid existed between the Credit Havrais and Scheuch and Company, what knowledge of or interest in the contracts or arrangements between Scheuch and Company and Steele, Miller and Company did the said bank have?

State whether or not said bank ever extended or intended to extend any credit to the said Steele, Miller and Company.

To the twelfth interrogatory he saith:

The Credit Havrais had no knowledge at all, and consequently no interest, in the arrangements passed between Scheuch & Company and Steele, Miller & Company.

1267 Working as I have explained above, the Credit Havrais never had to examine if it was convenient to extend a credit to Steele, Miller & Company and, consequenty, it had never any intention to do so.

Interrogatory No. 13:

Please give the date or dates of the first draft or drafts of Steele, Miller & Company which were accepted by the Credit Havrais under the aforesaid arrangements with Scheuch and Company. Give also the date or dates of the last of such drafts of Steele, Miller and Company accepted by the Credit Havrais. Please state the total number of bales of cotton during said period thus covered by drafts of Steele, Miller and Company accepted by the Credit Havrais.

To the thirteenth interrogatory he saith:

The first drafts issued on the Credit Havrais by Steele, Miller and Company, for account of Scheuch and Company,

bear the date of 10th of May, 1909, and the last drafts 7th of March, 1910. During that period the number of bales covered by drafts of Steele, Miller and Company on, and accepted by the Credit Havrais, amounted to 17,300 bales.

Interrogatory No. 14:

Did the Credit Havrais pay at maturity all said drafts of Steele, Miller and Company accepted by it? Did it receive all the cotton described in said accepted drafts? If not, please state the number of bales not received and the marks thereof, and the dates and amounts of the drafts drawn against the same. For the purpose of this question and answer, treat the one hundred bales of cotton concerned in this suit as cotton not received.

To the fourteenth interrogatory he saith:

The Credit Havrais paid at maturity all the drafts of Steele, Miller and Company accepted by said bank, which received all the cotton described by said drafts, with the exception of the following quantities:

1268 S R U I, 100 bales cotton draft of Frs. 38,828.20, dated 15th February, 1910.

Q R A S, 50 bales cotton party of draft of Frs. 39,299.30, dated 2d March, 1910.

R H E L, 100 bales cotton draft of Frs. 37,357.80, dated 5th March, 1910.

Q A T U, 100 bales cotton draft of Frs. 38,310.95, dated 5th March, 1910.

R T O U, 100 bales cotton draft of Frs. 37,892.50, dated 7th March, 1910.

Interrogatory No. 15:

With the exception of the cotton described in answer to the last interrogatory as not received, did Steele, Miller and Company perform their obligations in respect to the other drafts and shipment of cotton?

To the fifteenth interrogatory he saith:

With the exception of 450 bales cotton above described as never received, Steele, Miller and Company fulfilled their obligations relatively to the other drafts.

Interrogatory No. 16:

This is a suit in which J. A. E. Pyle, trustee in bankruptcy of Steele, Miller and Company, is suing to recover one hundred bales of cotton, or the value thereof, on the ground that the same were transferred by Steele, Miller and Company, while insolvent, to Scheuch and Company or the Credit Havrais, with the intent to prefer Scheuch and Company or the Credit Havrais or both of them—the cotton in ques[illegible] being marked and numbered as follows:

100 bales of cotton marked S R U I 1/100.

Please state whether the Credit Havrais ever accepted any draft drawn by Steele, Miller and Company against cotton so marked and numbered. If yes, please state when and by whom said draft was presented for acceptance and the date of acceptance.

What documents were attached to said draft when presented for acceptance? What became of said documents when the draft was accepted? If you say that they were delivered to the acceptor of the draft, state whether or not they have since remained in its possession or control.

Has the draft since been paid? If so, when and
1269 by whom?

Please annex as part of your answer to this interrogatory the said draft; and if you have answered that there were attached thereto bill of lading, insurance certificate and invoice, please likewise annex to said draft the bill of lading, insurance certificate and invoice attached thereto.

To the sixteenth interrogatory he saith:

The 28th February, 1910, the Credit Havrais received directly from the National City Bank of New York, to be accepted and sent afterwards to the "Banque Francaise Pour Le Commerce & L'Industrie," a Paris (French Bank for Commerce and Industry, Paris) a draft drawn the 15th of February, 1910, by Steele, Miller and Company, at 90 days sight on the Credit Havrais under the number 2,214 for Frs. 38,828.20.

To said draft the following documents were annexed:

1° Through bill of lading to S R U I, 100 bales cotton per French Line.

2° Insurance Certificate, issued by Insurance Co. of North America, Philadelphia, covering the cotton for Frs. 44,000 (forty-four thousand francs).

3° Copy of invoice.

These exhibits are annexed to the present declaration under the numbers 2, 3 and 4.

Against its acceptance the Credit Havrais kept the above documents, which, since then, have remained always in its possession.

On expiration, the 29th May, 1910, the Credit Havrais paid its said acceptance, in the hands of Credit Lyonnais, which was the bearer of it.

This said draft is annexed to the present declaration, as exhibit, under the number 5.

Interrogatory No. 17:

State whether or not the said bank had any reason at the time for not believing that the bill of lading attached to the draft was genuine. What was the belief of the bank
1270 on the subject?

What, if any, reason had the bank at the time for not believing that the cotton described in the said draft and bill of lading had been actually shipped and was on its way? What was the belief of the bank on the subject?

What was the belief of the bank in respect to the transfer to it of said bill of lading and its possession thereof being sufficient to give it possession and dominion over said cotton and entitling it to receive the same on its arrival?

To the seventeenth interrogatory he saith:

In giving its acceptance, the Credit Havrais had no reason to doubt the authenticity of the through bill of lading which was remitted to it. Its conviction was that the S R U I, 100 bales, had been regularly loaded and would be delivered to its bank on arrival of the steamer, as that had occurred for all the previous expeditions of the firm of Steele, Miller and Company.

Interrogatory No. 18:

If, in answer to previous interrogatory, you have stated that the bank believed that said bill of lading was genuine, that the

cotton described therein and in the draft had been actually shipped and was on its way to Havre, and that the transfer to it of said bill of lading and its possession thereof gave it possession of and dominion over said cotton and entitled it to receive the same on its arrival, state what effect said beliefs had upon the action of the bank in accepting said draft. If the bank had not entertained such beliefs, would it have accepted, or would it have refused to accept, said draft?

To the eighteenth interrogatory he saith:

The Credit Havrais would have refused to give its acceptance if it had not the belief that the drawing was regular and the documents authentic.

Interrogatory No. 19:

Did said bank ever receive any bill of lading issued by the Compagnie Generale Transatlantique covering one
1271 hundred bales of cotton, corresponding with the marks and numbers of the lot of one hundred bales of cotton above referred to?

If yes, state when and how it received said bill of lading and whether a letter or note accompanied the same. Were there two sets of said bill of lading? State what has become of the original annex to the other set of said bill of lading to your answer to this interrogatory. Annex also the letter, if any accompanied the bill of lading, and state whether it is truly the letter which you received at the time, and from whom it was received.

In whose possession and control has been the said bill of lading of the Compagnie Generale Transatlantique since said bank received the same?

In whose possession or control has been the bill of lading attached to the said draft since the said bank received the same?

To the nineteenth interrogatory he saith:

On the 7th of May, 1910, the Credit Havrais received through Messrs. Scheuch & Co., according to the note I annex to the present interrogatory, under number 6, a custody bill issued by the Compagnie Generale Transatlantique, covering

100 bales cotton corresponding with the marks S R U I, to the lot of 100 bales cotton above referred to.

I have not considered that this bill of lading formed with the "Through Bill" annexed to the draft a second set of bill of lading for the same merchandise, but it was representing for the Credit Havrais the shipping documents, or ocean bill of lading, which are always sent to the receiver of the merchandise, and I considered them as equivalent to the "Master's Receipt."

Since then the through bill and the custody bill have remained in the possession of the Credit Havrais.

I annex the custody bill to the present interrogatory under the number 7.

1272 Interrogatory No. 20:

At the time the bank received the said bill of lading of the Compagnie Generale Transatlantique, hereafter called the custody bill of lading, did you or the bank know that said bill of lading attached to the draft was not genuine, but was forged or bogus?

Did you or the said bank know or believe at the time that said custody bill of lading represented cotton acquired and shipped by Steele, Miller and Company subsequenty to the drawing and forwarding of the said draft and the said attached bill of lading or did you and the bank believe that said custody bill of lading represented the same cotton as the bill of lading attached to the draft apparently represented?

What knowledge or information had you or the said bank at any time prior to the receipt of said custody bill of lading that Steele, Miller and Company intended to procure and forward to the bank said custody bill of lading?

It is charged on behalf of the complainant that at same time subsequent to the date of said draft and the attached bill of lading Steele, Miller and Company acquired and assembled one hundred bales of cotton, caused the same to be marked and numbered to correspond with the marks and numbers described in the said draft, and caused the same to be shipped to New Orleans and thence by steamer of the Compagnie Generale Transatlantique to Havre, being the same cotton represented by the said custody bill of lading. State what knowledge or information you or the said bank had of these alleged acts of

Steele, Miller and Company at the time the bank received said custody bill of lading.

To the twentieth interrogatory he saith:

When I received the custody bill of lading remitted by the Compagnie Generale Transatlantique, I was not aware that the bill of lading attached to the draft was not genuine, but falsed. I was not aware, neither, that this document was representing cotton acquired by Steele, Miller & Company, subsequently to the drawing. I believed that this new document concerned the same cotton as that which was represented by the bill of lading attached to the draft and was only the bill of lading delivered by the steamship company as continuation of the through bill.

1273.

At the time of receiving the custody bill of lading the Credit Havrais has no knowledge of the of Steele, Miller & Company concerning the purchase of the shipment of the S R U I, 100 bales cotton, per "Texas."

The facts alleged by the trustee were entirely unknown of myself and of the bank.

Interrogatory No. 21:

Please state whether on any prior occasion or occasions the said bank had received similar custody bills of lading purporting to represent the same cotton covered by through bills of lading attached to drafts for the price of the cotton, which had been previously accepted by the bank. If yes, state on what occasion, and what, if any, explanations were given, and whether the same were believed by the bank. Please answer this question fully.

What effect had such previous experience and explanation in causing the said bank to suspect or not to suspect fraud or wrong on the part of Steele, Miller and Company when it received said duplicating custody bill of lading covering the said one hundred bales of cotton?

To the twenty-first interrogatory he saith:

Previously to the remittance of the above custody bill, the Credit Havrais had received from Steele, Miller and Company, through Messrs. Scheuch & Company, similar documents, but for quantities of cotton of a little importance, by which its attention was not awakened in the belief that these

custody bills were constituting a continuation of document just referring to the same cotton represented by the through bill of lading attached to the drafts.

These custody bills, moreover, well represented
1274 the engagement of the ship to deliver the merchandise to Havre, and therefore were giving to me the certitude that cotton had been shipped.

Interrogatory No. 22:

State, if you know, when and how the said bank, or any representative thereof, learned for the first time that the said custody bill of lading did not cover, or was claimed not to cover, cotton shipped at the date of said bill of lading attached to said draft, but covered, or was claimed to cover, cotton subsequently acquired and shipped by Steele, Miller and Company.

It is charged by complainant that at the time Steele, Miller and Company delivered the cotton covered by the said custody bill of lading to the Compagnie Generale Transatlantique or at the the time it forwarded the said custody bill of lading to Havre, or at the time the same came into the physical possession of the Credit Havrais, the said bank knew or ought to have known that Steele, Miller and Company intended thereby to prefer said bank over their other creditors.

Please state whether said charge is true at any of said times, and give the reasons or facts upon which your answer is based.

To the twenty-second interrogatory he saith:

On the 29 April, 1910, the Credit Havrais learned by Messrs. Schench and Company of the suspension of Steele, Miller and Company. The information of this event did not give the reasons of the suspension to the Credit Havrais and, it was only much later, by correspondence from America, that the fraudulent acts of Steele, Miller and Company were known.

The 7th of May, 1910, when receiving the custody bill of the S R U I, 100 bales cotton per "Texas," the Credit Havrais was ignorant of the acts of Steele, Miller & Com-
1275 pany, because nine days only had passed between the suspension and the arrival of the document in the hands of the Credit Havrais, which has persisted to believe that the custody bill was referring to the cotton covered by the through bill of lading.

(No 23rd interrogatory.)

To the twenty-third interrogatory he saith:

When the Credit Havrais received the custody bill it did not believe that said remittance would be an advantage for the bank, because it was only the execution of the engagements of Steele, Miller & Company, of whose acts the Credit Havrais was ignorant.

Interrogatory No. 24:

When the Credit Havrais received the said custody bill of lading did it know or believe that it was thereby receiving an interest or right in or to the cotton purporting to be covered thereby in addition to what it believed it already had as acceptor of the said draft and the holder of the said bill of lading attached thereto?

To the twenty-fourth interrogatory he saith:

When receiving the custody bill the Credit Havrais was not acquiring any title or right in addition, but only a facility for obtaining the delivery of the cotton by the steamer, as the through bill alone, accompanied by a guarantee for the failing master's receipt, was sufficient to get delivery of the cotton on arrival.

Interrogatory No. 25:

Please state fully and in detail the extent and nature of the knowledge or information of the Credit Havrais as to the solvency or insolvency of Steele, Miller and Company at the time it accepted said draft, at the date of said cus-
1276 tody bill of lading and at the date when the same came into the actual physical possession of said bank. Give the nature, extent and source of the bank's information on the subject from day to day from the date of the reported failure of Knight, Yancey and Company.

If, in answer to previous question, you state that on April 29th, 1910, a cable was received by Schenck and Company from Steele, Miller and Company announcing that the latter had suspended payment, state what knowledge or information the said bank then had as to the assets or liabilities of Steele, Miller and Company or as to the sufficiency of their property at a fair valuation to pay their debts.

To the twenty-fifth interrogatory he saith:

The Credit Havrais, dealing for account of Messrs. Scheuch and Company, had not to look particularly after the situation of Steele, Miller and Company; in a general manner, however, the informations he had about that firm were favorable, and this good impression was subsisting when it accepted the draft drawn against the 100 bales cotton S R U I.

For the reasons given previously the Credit Havrais had not to watch the situation of Steele, Miller and Company, on account of the suspension of Knight, Yancey and Company. The Credit Havrais was always under the impression that the documents in its hands assured to its bank the possession of the cotton.

Interrogatory No. 26:

If, in answer to previous interrogatories, you have stated that the bank believed that the custody bill of lading represented the same cotton which had been paid for by the acceptors of the said draft, and which the bank was entitled to receive, state what effect, if any, knowledge of the insolvency of Steele, Miller and Company by the bank at the date of said custody bill of lading or at the date when it came into the physical possession of the bank would have had upon the belief of the bank that it was receiving only cotton to which it was entitled.

1277

To the twenty-sixth interrogatory he saith:

The advertisement of the suspension of the firm of Steele, Miller and Company did not alter in any way the impression the Credit Havrais had that it should receive the cotton to which it had the right and title, according to the documents then in its possession, and the same was the case on the 7th of May, when it received the custody bill issued by the Compagnie Generale Transatlantique.

Interrogatory No. 27:

State, if you know, the financial condition of Scheuch and Company and the individual members of said firm, and how long they have been in such financial condition.

To the twenty-seventh interrogatory he saith:

I have given the information asked, in my answer to the interrogatory number six.

Interrogatory No. 28:

There has been offered in evidence on behalf of the complainant in this cause a copy of a publication at Havre called the Bulletin de Correspondence of date April 27, 1910, which contains the following:

"Nous avons parle, hier, d'une nouvelle faillite aux Estate-Unis. A ce propos, on a recu, de Liverpool, le telegramme suivant; Plusieurs Maisons de coton seraient atteintes par la faillite de la Maison Steel, Miller & Co. de Memphis, qui faisait de nombreuses affairs avec l'Europe."

And a copy of the same publication, dated April 28, 1910, which contains the following:

"Cette semaine, les marches ont ete influences par deux sortes d'evenments. En premier lieu, on a apprais la faillite de deux Maisons d'exportation des Estate-Unis; si les details donnes se pouvaient que semer la mefiance et, par suite, amener un ratentissement des affairs, par contre, ils devaient contribeur au reaffermissement de cours, puisqu'ils indiquaient law possibilite de ne pas etre livre de coton achete, du moins dans le delais prevus. Il est a esperer, d'ailleurs, qu'l y de l'exageration dans toutes les rumeurs mises en circulation et que ce qui vient de se passer aura surtout pour resultat de faire rechercher les moyes qui assureront une plus grande securite a ceux qui deivent importer du coton."

1278 Please state whether the quoted paragraphs from said paper or either of them was read or known at the time by you or any representative of the Credit Havrais. Please state, if you know, any reports or information which came to you or the Credit Havrais at the time of said publication which tended to confirm or to discredit or cast doubt upon the correctness of the statements in said quoted paragraphs.

To the twenty-eighth interrogatory he saith:

The "Bulletin de Correspondence" is a publication which interests particularly the commercial firms, and, for this reason, it is rarely read by the bankers, therefore the two paragraphs reported in this interrogatory were unknown to

me, nobody in the Credit Havrais having remarked them, moreover, even if I had known them, it would not have changed my conviction that the 100 bales covered by the bill of lading per "Texas" were really those forming the supply for our acceptance.

Interrogatory No. 29:

There has been offered in evidence on behalf of the complainant in this cause a copy of a publication called the Liverpool Daily Port and Liverpool Mercury of date April 27th, 1910, which begins with the following head-lines:

"Cotton Market Outlook
Another American Firm
Suspends Payment
Disturbing Succession of
Unsettling News
The Knight, Yancey, Position.
Losses Smaller Than Originally
Feared;"

and the first paragraph of which is as follows:

1279 "The Liverpool cotton market has received further shocks to-day—first, by the alarming reports of new crop damage from frost, which many of the morning papers treated in 'scare' fashion; and later by the statement that another American firm, Mess. Steele, Miller and Co. of Memphis, had suspended payment. Liverpool, we understand, it [is] not largely affected by the failure, the losses falling chiefly on Bremen importers."

Please state whether the above article from said paper was read or known at the time by you or any representative of the Credit Havrais. Did you or any representative of the said bank receive any reports or information about the time of said publication which tended to confirm or to discredit and cast doubt upon the correctness of the statements in said quoted paragraphs. If so, state, if you have not already done so, what were said reports or information.

To the twenty-ninth interrogatory he saith:

The heading and the first paragraph of the article published

in "The Liverpool Daily Post and Liverpool Mercury," reported in this interrogatory, are unknown to me; I cannot give any indication about it.

Interrogatory No. 30:

Has the Credit Havrais any available means to be reimbursed or paid the drafts against said 100 bales of cotton, except through the sale of the said cotton in controversy in this suit?

To the thirtieth interrogatory he saith:

On account of the actual financial situation of the firm Schcuch & Company, the Credit Havrais has no means to be reimbursed of its acceptance, but only by the sale of the cotton litigant in this case.

Interrogatory No. 31:

Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

1280 To the twenty-first [thirty-first] interrogatory he saith:

Having answered faithfully and with all sincerity to the questions in this interrogatory, I only want to express my confidence in the favorable issue of this suit, for the Credit Havrais, because its cause is right and said bank has always acted in good faith.

(Signed) J. CASTEL.
(Signed) J. B. BEECHER,
[Seal] Commissioner.

1281 Cross-Examination of JULES CASTEL, ESQUIRE.

First cross-interrogatory:

Please state whether the Credit Havrais has an agent within the City of New Orleans, State of Louisiana, or within the Eastern District of Louisiana.

1297 EXHIBITS ANNEXED TO DEPOSITION OF JULES CASTEL.

Filed October 24, 1911.

United States District Court, Eastern District of Louisiana.

J. A. E. Pyle, Trustee,
vs. No. 14,277
Texas Transport & Terminal Co. et al.

City of Havre,
Republic of France.

At the execution of a commission for the examination of witnesses in a case depending in the District Court of the United States for the Eastern District of Louisiana, wherein J. A. E. Pyle is complainant, and the Texas Transport and Terminal Company et als. are defendants, these exhibits, numbered 1 to 14 inclusive, were produced and sworn to by J. Castel, director of the Credit Havrais, of Havre, France, who subscribed his name to this certificate at the time of his examination.

(Signed) JOHN PRESTON BEECHER,
Vice Consul of the United States of America, at Havre, France, and Commissioner.

(Sig.) J. CASTEL.
[Seal]

1298 Exhibits numbered 2, 3, 4 and 5, being through bill of lading, insurance certificate, invoice and draft, omitted per instructions.

* * * * * * * *

1305 Scheuch & Co.
Havre.

Je/K.

Havre, May 7, 1910.

Credit Havrais,
E/V.
Gentlemen:

Enclosed we have the pleasure to remit you custody bill of lading for

S. R. U. I. 100 B.

for which you will please acknowledge receipt.

Accept, gentlemen, our sincere salutations.

p. pro. SCHEUCH & CO.
GEO. FREBOURG.

14277. Exhibit No. 6.

1306 Exhibit No. 7: Custody bill of lading. Omitted per instructions.

* * * * * * * *

Statement of Acceptances of the Credit Havrais of the Drafts of Mess. Steele, Miller & Co., Corinth, before the 1st of September, 1909.

Date of Drawings		Amounts	Date of Payment	No. of Bales	Marks
1909					
April 28th	Steele, Miller & Co., Corinth	$ 10,747.88	August 8th	200 B	R P E E 100 B R O O W 100 "
" "	"	15,471.51	" "	300 "	Q E J N 100 " R A K P 100 "
" 29th	"	15,065.53	" 10th	300 "	R B B O 100 " R E P Q 100 "
" "	"	5,014.10	" "	100 "	Q A K A 100 " R M V C 100 " R F O M 100 "
" "	"	5,031.98	" "	100 "	R O L G
May 6th	"	10,610.97	" 17th	200 "	R W O E 100 B R V K P 100 "
" "	"	15,930.81	" "	300 "	Q Q R K 100 " R X V W 100 "
" 7th	"	10,451.88	" "	200 "	R A O W 100 " R M R M 100 " R I M M 100 "

EXHIBIT No. 9.

Statement of Acceptances of the Credit Havrais of the Drafts of Mess. Steele, Miller & Co., Corinth, before the 1st of September, 1909.

Date of Drawings		Amounts	Date of Payment	No. of Bales	Marks
May 7th	Steele, Miller & Co., Corinth	15,814.27	August 17th	300 B	RFKO 100 B QELL 100 " QXON 100 "
" "	"	5,274.17	" 22nd	100 "	RATO
" 13th	"	10,578.93	" "	200 "	RTTA 100 " RMZX 100 "
" "	"	11,026.78	" "	200 "	RIAT 100 " QERT 100 "
" "	"	11,040.03	October 3rd	200 "	ROOC 100 " RXPR 100 "
June 23rd	"	5,571.69	" "	100 "	RMUA 50 " PGNE 50 "
" "	"	16,532.84	" "	300 "	SRUT 100 " SIAL 100 " SAAR 100 "
" "	"	11,187.37	" "	200 "	RWXO 100 " RRRK 100 "
" "	"	5,513.92	" "	100 "	RURX
" "	"	5,581.25	" "	100 "	RZOV

" "	"	8,653.95	"	10th	300 "	SAOX	100 B
			"	"		SXVQ	100 "
						RITN	100 "
" "	"	11,770.09	"	"	200 "	QAQQ	100 "
						RMOK	100 "
" "	"	5,818.92	"	"	100 "	SNOT	
" "	"	11,867.16	"	"	200 "	PGSV	100 "
						RHVG	100 "
" "	"	11,693.74	"	"	200 "	SIAA	100 "
						RQTV	100 "
" "	"	12,162.39	"	13th	200 "	SAXW	100 "
						SSSK	100 "
July 5th	"	12,332.81	"	"	200 "	SNIN	100 "
						RRKK	100 "
" "	"	12,346.55	"	"	200 "	SRSR	100 "
						ROOM	100 "
" "	"	12,271.94	"	"	200 "	SINP	100 "
						ROAA	100 "
					5300 "		
					5300 B/		
1309 1909.							
July 5th	Steele, Miller & Co.,	12,409.86	October	13th	200	RKKQ	100B/
						PKJJ	100 "
" 7th	Corinth	12,272.48	"	17th	400	RGFW	100 "
						SOKC	100 "

EXHIBIT No. 9.

Statement of Acceptances of the Credit Havrais of the Drafts of Mess. Steele, Miller & Co., Corinth, before the 1st of September, 1909.

Date of Drawings		Amounts	Date of Payment	No. of Bales	Marks
July 7th	Steele, Miller & Co., Corinth	12,379.52	October 17th	200	R E D Z 100 B R N N A 100 "
" "	"	12,343.62	" "	200	R E B X 100 " R W W X 100 "
" "	"	12,442.21	" "	200	R A D F 100 " R C B E 100 "
" "	"	12,241.60	" "	200	S G N I 100 " S A I T 100 "
" "	"	6,121.66	" "	100	R N W W R O O D
" "	"	12,306.85	" "	200	R A A A 100 "
" "	"	12,176.27	" "	200	P R I Z 100 " S S A B 100 "
" "	"	12,192.35	" "	200	S C F O 100 " S X X L 100 "
" "	"	12,398.02	" "	200	S M O M 100 " Q I A T 100 "
" "	"	6,102.47	" "	100	S I X O

EXHIBIT No. 10.

No. 2.

State of Acceptances of Credit Havrais of the Drafts of Mess. Steele, Miller & Co., Corinth, after the 1st of September, 1909.

Dates of Drafts 1909		Amounts	Date of payment	No. of Bales	Marks
	Steele, Miller & Co.,				
Sept. 2nd	Corinth	$5,716.61	Dec. 15th	100 B/	R C Z Z
" "	"	11,259.00	" "	200	Q A X D 100 G K O Z 100
" "	"	11,248.95	" "	200	Q D O X 100 Q A K O 100
" "	"	5,836.39	" "	100	R K O M
" "	"	5,869.97	" "	100	R K P Q
Oct. 22nd	"	6,875.87	Feby. 1st	100	(Q) S G E
" "	"	7,034.07	" "	100	(R) V A L
" "	"	6,709.30	" "	100	S I R L
" "	"	6,942.62	" "	100	R P Y N
" "	"	6,919.14	" "	100	R O H I
" "	"	6,790.47	" "	100	R O A C
" "	"	6,929.09	" "	100	R A W O
" "	"	6,640.67	" "	100	T E B T
" 23rd	"	6,940.52	" 2nd	100	R L O Y
" "	"	6,955.50	" "	100	R W A Q

EXHIBIT No. 10.

No. 2.

State of Acceptances of Credit Havrais of the Drafts of Mess. Steele, Miller & Co., Corinth, after the 1st of September, 1909.

Dates of Drafts 1909		Amounts	Date of payment	No. of Bales	Marks
Oct. 23rd	Steele, Miller & Co., Corinth	7,042.34	Feby. 1st	100	R K S O
" "	"	6,890.82	" "	100	S R G A
" "	"	6,997.94	" "	100	R A S I
" "	"	7,174.68	" "	100	R V A R
" "	"	7,060.67	" "	100	R R W S
" "	"	7,159.82	" "	100	R I M A
" 25th	"	7,028.09	" "	100	P T L L
" "	"	7,222.75	" "	100	R L O T
" "	"	7,121.24	" "	100	S C E N
" "	"	6,975.63	" "	100	R T V R
" "	"	7,166.98	" "	100	Q W E R
" "	"	7,146.21	" "	100	S K V S
" "	"	7,191.05	" "	100	O C E H
				3000 B/	
1311				3000 B/	
Oct. 25th	"	$ 7,114.90	Feby. 2nd	100	R B I P
" "	"	7,112.64	" "	100	R H E V

"	"	"	7,159.34	"	"	100	R I V E
"	"	"	7,136.20	"	3rd	100	R D I G
"	22nd	"	6,863.18	"	6th	100	R N E J
"	26th	"	6,897.16	"	"	100	V B V B
"	27	"	6,816.88	"	"	100	R G H H
"	30th	"	7,480.39	"	8th	100	Q E R E
"	"	"	7,462.55	"	"	100	S R S E
"	"	"	7,439.03	"	"	100	R V W V
"	"	"	7,358.29	"	"	100	S D O Y
"	"	"	7,322.41	"	"	100	S E A C
"	"	"	7,431.32	"	"	100	Q W I K
"	"	"	7,224.45	"	"	100	S D L R
"	"	"	7,426.44	"	"	100	S E X Q
"	"	"	7,529.71	"	"	100	R A W B
"	"	"	7,445.69	"	13th	100	R F O H
"	"	"	7 410.05	"	"	100	R O C W
Dec.	13th	"	7,335.17	Mch.	27th	100	S D I G
"	"	"	7,496.63	"	"	100	R C A A
"	"	"	7,465.25	"	"	100	Q F A T
"	"	"	7,580.74	"	"	100	R E M A
"	"	"	7,678.27	"	"	100	R E I C
"	18th	"	7,546.75	"	29th	100	Q A H O
"	"	"	7,543.71	"	"	100	Q A R E
"	"	"	7,455.59	"	"	100	R E A M
"	20th	"	7,691.54	"	30th	100	Q R L A
"	"	"	7,532.71	"	"	100	Q V I S

EXHIBIT No. 10. No. 2.

State of Acceptances of Credit Havrais of the Drafts of Mess. Steele, Miller & Co., Corinth, after the 1st of September, 1909.

Dates of Drafts 1909		Amounts	Date of payment	No. of Bales	Marks
Dec. 20th	Steele, Miller & Co.,	7,621.78	April 3rd	100	Q T V A
" 21st	Corinth	7,666.91	" "	100	R N O S
" "	"	7,581.94	" "	100	Q L N O
" 23rd	"	7,761.46	" 6	100	R S P I
" "	"	7,665.88	" "	100	R A F K
" "	"	7,782.22	" "	100	Q W E R
" "	"	7,667.29	" "	100	R M E S
				6500 B/	
1312				6500 B/	
Dec. 23rd	"	7,776.35	April 6th	100	R L O R
" "	"	7,609.35	" "	100	R O B V
" "	"	7,664.44	" "	100	R A R K
" "	"	7,787.92	" "	100	Q K I G
" "	"	7,640.09	" "	100	R Y A T
" "	"	7,752.54	" "	100	R A A R
" "	"	7,646.97	" "	100	R C A T
" "	"	7,582.56	" "	100	R R E N
" "	"	7,601.80	" "	100	R D O M

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"	"	"	7,652.98	"	"	100	Q Z T A
"	"	"	7,789.88	"	"	100	Q S N O
"	"	"	7,824.63	"	"	100	R A D Z
"	27th	"	7,670.67	"	10th	100	R F G V
Feby.	14th	"	7,498.79	May	25th	100	Q L E R
"	"	"	7,514.38	"	"	100	R D J K
"	15th	"	7,523.33	"	29th	100	R K O S
"	"	"	7,542.44	"	"	100	R D E R
"	"	"	7,543.18	"	"	100	Q P O O
"	"	"	7,423.46	"	"	100	R N T N
"	"	"	7,499.10	"	"	100	Q F E G
"	"	"	7,466.96	"	"	100	S R V I
"	17th	"	7,316.00	"	30th	100	R T G H
"	"	"	7,520.20	"	"	100	R M A S
"	"	"	7,557.55	"	31st	100	Q R A S
"	"	"	7,432.21	"	"	100	R L I A
"	21st	"	7,149.75	June	3rd	100	R C O L
"	"	"	7,184.19	"	"	100	R H E L
"	"	"	7,367.46	"	"	100	Q A T V
"	"	"	7,124.46	"	"	100	S C K R
"	16th	"	7,421.09	"	5th	100	Q R S Y
"	"	"	7,298.99	"	"	100	R B H K
"	18th	"	7,287.01	"	"	100	R T O V
"	"	"	7,396.93	"	"	100	R K A S

9800 B/

1313 Memorandum.

Scheuch & Co.

Telephone 9, 12.

Havre.

25 De Le Bourse Street.

Havre, January 10th, 1910.

To M. Credit Havrais,
E/V.

Gentlemen:

Enclosed we remit you bill of lading for R. K. P. Q. 100 B. C. and request you to return us the through bill of lading.

Receive, gentlemen, our sincere salutations.

p. pro. SCHEUCH & CO.
By GEO. FREBOURG.

14277. Exhibit No. 11.

1314 Memorandum of

Scheuch & Co.

Telephone 9, 12.

25 De Le Bourse Street.

Havre, March 24, 1910.

To Credit Havrais,
E/V.

Gentlemen:—

We are enclosing port bill of lading for

S.	E.	L.	R.	100
S.	P.	Y.	N.	100
R.	U.	H.	I.	100
R.	R.	S.	O.	100
R.	A.	S.	E.	100

by s/s Memphian

R.	L.	O.	Y.	100
R.	E.	O.	H.	100
R.	O.	C.	W.	100

by s/s Kingstonian

and requesting that you kindly return the through bill of lading.

Receive, gentlemen, our sincere salutations.

p. pro. SCHEUCH & CO.
GEO. FREBOURG.

14277. Exhibit No. 12.

1315 United States District Court, Eastern District of Louisiana, New Orleans Division.

J. A. E. Pyle, Trustee,
vs. No. 14,240
Texas Transport & Terminal Company, et als.

Stipulation of counsel in the cases numbered 14,240, 14,241, 14,242, 14,243 and 14,277, whereby all the exhibits annexed to the foregoing depositions, except those included in the above offer, have, by agreement, been withdrawn because, in the opinion of counsel, they were irrelevant, cumulative or duplicates.

Offered by the Bank of Mulhouse, and referred to in its Note of Evidence.

Note:—

Copied into this transcript, at page 627 thereof.

1316 EVIDENCE ON BEHALF OF COMPTOIR D'ESCOMPTE DE MULHOUSE.

United States District Court, Eastern District of Louisiana, New Orleans Division.

J. A. E. Pyle, Trustee,
vs. No. 14,240
Texas Transport & Terminal Company, et als.

Note:—

Evidence offered on behalf of Comptoir d'Escompte de Mulhouse, as per its Note of Evidence copied into the tran-

script of appeal in the case entitled as above, and numbered 14,241 of the docket of the said Court, same as that offered on behalf of the Bank of Mulhouse.

1317 EVIDENCE ON BEHALF OF PAUL CHARDIN.

United States District Court, Eastern District of Louisiana, New Orleans Division.

J. A. E. Pyle, Trustee,
vs. No. 14,240
Texas Transport & Terminal Company, et als.

Note:—

Evidence offered on behalf of Paul Chardin, as per his Note of Evidence copied into the transcript of appeal in the case entitled as above and numbered 14,242 of the docket of the said Court, same as that offered on behalf of the Bank of Mulhouse.

1318 EVIDENCE ON BEHALF OF SOCIETE GENERALE.

United States District Court, Eastern District of Louisiana, New Orleans Division.

J. A. E. Pyle, Trustee,
vs. No. 14,240
Texas Transport & Terminal Company, et als.

Note:—

Evidence offered on behalf of Societe Generale, as per its Note of Evidence copied into the transcript of appeal in the case entitled as above numbered 14,243 of the docket of the said Court, same as that offered on behalf of the Bank of Mulhouse.

1319 EVIDENCE ON BEHALF OF CREDIT HAVRAIS.

United States District Court, Eastern District of Louisiana, New Orleans Division.

J. A. E. Pyle, Trustee,
vs. No. 14,240
Texas Transport & Terminal Company, et als.

Note:—
Evidence offered on behalf of Credit Havrais, as per its Note of Evidence, copied into the transcript of appeal in the case entitled as above and numbered 14,277 of the docket of the said Court, same as that offered on behalf of the Bank of Mulhouse.

1320 RESUMED HEARING AND SUBMISSION.

Extract From the Minutes.

November Term, 1911.

New Orleans, Tuesday, November 21st, 1911.
Court met pursuant to adjournment.
Present: Hon. Rufus E. Foster, Judge.

J. A. E. Pyle, Trustee,
vs. No. 14,240.
Texas Transport and Terminal Company, et als.

This cause, as continued from Monday, November 20th, 1911, for further hearing, was this day resumed:
Present: The solicitors for the respective parties, and was argued and submitted, when the Court took time to consider.

1321 OPINION OF THE COURT.

Filed December 28, 1911.

United States District Court, Eastern District of Louisiana.

J. A. E. Pyle, Trustee,

vs. No. 14,240

Texas Transport & Terminal Company, et als.

It appears that the firm of Steele, Miller & Company, domiciled at Corinth, Miss., were engaged in a large cotton exporting business, and, in the course of their business, drew nine drafts on the Bank of Mulhouse, aggregating about $66,000.00, and all in substantially the same form, of which the following is a fair sample:

"90 days after sight of this First of Exchange (Second unpaid) pay to the order of Ourselves.

Forty thousand two hundred and seventeen.....90/100 francs. Value received, and charge to account R.D.A.R. 1/100 Bales Cotton.

To Banque de Mulhouse.

Havre, France.

(Sig.) STEELE, MILLER & CO."

To these drafts were attached what purported to be nine railroad through bills of lading from points in Mississippi to Havre, France, each for 100 bales of cotton, shipped by Steele, Miller & Company to their own order, with instructions to notify Scheuch & Company, and indorsed in blank, but which were, in reality, entirely forged and fictitious, and no cotton at all had been actually shipped. There were also attached to the drafts the usual invoices and insurance certificates. Steele, Miller & Company discounted these drafts in the usual manner, and they were in due time accepted by the Bank of Mulhouse and ultimately paid.

Thereafter, Steele, Miller & Company assembled 900 bales of cotton at New Orleans, marked it and consigned it identically as represented by the forged bills of lading and shipped it to Havre by The Compagnie Generale Transatlantique, took for it port or custody bills of lading and mailed them to Scheuch & Company, who were their agents, with instructions to deliver

To the first cross-interrogatory he saith:

The Credit Havrais has no agent in the City of New Orleans nor in the Eastern District of the State of Louisiana.

Second cross-interrogatory:

State if your authorizations to Scheuch & Company to have drafts drawn on the Credit Havrais by Scheuch & Company's American customers was in any way different from the ordinary and customary method prevailing in Europe by which banks accept drafts, retaining possession of the documents until the acceptances have been discharged.

To the second cross-interrogatory he saith:

The operations between the Credit Havrais and Scheuch and Company were identical to those practiced by the banks in Europe, that is to say, that the American customers of Scheuch & Company were drawing on the Cradit [Credit] Havrais drafts, which documents relating to them, or the merchandise, were remaining in the possession of the bank, till complete discharge of the acceptances.

Third cross-interrogatory:

State if the Credit Havrais ever had at any time any relations or dealings with Steele, Miller & Company by which the said Credit Havrais purchased from Steele, Miller & Company any cotton, and state particularly if you purchased from Steele, Miller & Company the one hundred bales of cotton marked SRUI.

To the third cross-interrogatory he saith:

Never, the Credit Havrais bought directly cotton from Steele, Miller & Company.

1282 The acceptance against the 100 bales cotton marked S. R. U. I., was given for account of Scheuch & Company, as I have explained it, under the number 16 of the direct interrogatory.

Fourth cross-interrogatory:

If you answer that you did make a direct purchase of this cotton from Steele, Miller & Company, state whether or not the negotiations for the purchase were verbal or in writing, and if you answer that they were verbal, you will state the

date or dates on which these negotiations took place, and with whom and in the presence of whom; and if you should answer that the contract was in writing, you will annex to these interrogatories copies of any agreements and all correspondence leading up thereto, and you will permit the authority taking these dispositions to examine the original documents and papers and verify your statements, certifying that same are correct.

To the fourth cross-interrogatory he saith:

My answer to the preceding interrogatory exempts me from answering to this.

Fifth cross-interrogatory:

Please state whether it was and is your custom to purchase cotton in the American market for your own account, or whether or not your business, in so far as cotton is concerned, is confined to the accepting of drafts for account of your own customers.

To the fifth cross-interrogatory he saith:

The Credit Havrais, being a bank establishment, never buys merchandises for its own account; its operations consist especially to accept documentary drafts for account of its customers.

Sixth cross-interrogatory:

State whether or not you charge a commission for accepting drafts and whether the same is not the usual and customary commission charged by foreign banks, and attach to your depositions a statement showing the commissions charged by you on the acceptances for account of Schench & Company of the drafts drawn by Steele, Miller & Company.

To the sixth cross-interrogatory he saith:

The Credit Havrais charges a commission of 1/4%, on the amount of its acceptances for account of its cus-
1283 tomers. That rate is the one practiced usually.

I don't see the necessity to furnish a statement of commissions charged for the drafts of Steele, Miller & Company, the copy of account, asked for by the following cross-interrogatory, giving this indication.

Seventh cross-interrogatory:

File with your deposition a copy of the account of Scheuch & Company with your house from September 1, 1909, to date. Permit the notary to examine the original books and papers showing the account so as to verify your statements as being correct.

To the seventh cross-interrogatory he saith:

According to the wish expressd by this interrogatory, I annex under the number 8, an extract of the account of Messrs. Scheuch & Company with the Credit Havrais, from 1st July, 1909, till this day, and I hold the original books to the disposition of every person duly authorized for verification of them.

Eighth cross-interrogatory:

What drafts of Steele, Miller & Company had you accepted under your arrangement with Scheuch & Company previous to September 1, 1909? Attach to your depositions a statement of the drafts, the marks of the cotton supposed to have been secured by bills of lading, the dates the said drafts were drawn and the dates the said drafts were paid; and state particularly whether or not they were paid by you by the sale of the cotton, and is [if] so, attach to these depositions a statement showing the disposition of the cotton, to whom sold and how the proceeds were applied.

To the eighth cross-interrogatory he saith:

I annex under number 9 a statement of the drafts drawn before the 1st September, 1909, by Steele, Miller & Company on the Credit Havrais, for account of Scheuch and Company.

All these acceptances were settled by the net proceeds of the sale of the cottons. I cannot, however, exhibit the accounts of sales, these accounts having been established by Messrs. Scheuch and Company.

1284 For the surplus of this cross-interrogatory, the Extract of Account-Current exhibited with the number 8, contains all the indications asked for.

Ninth cross-interrogatory:

Attach to these depositions a statement of drafts drawn by Steele, Miller & Company against your bank and accepted

by you under your engagement d'importation from September 1, 1909, up to and including the last draft accepted previous to the bankruptcy proceedings, to-wit, May 4, 1910. Describe each draft, describe the character of security attached, (bill of lading), give the date on which each draft was accepted and the date on which each was paid or discharged, and state particularly how discharged, and state whether the draft was paid by the sale of the cotton by your bank, or by Scheuch & Company; and if you state the drafts were paid by the sale of the cotton by your bank, then attach a statement showing the sale, to whom made and how the proceeds were applied.

To the ninth cross-interrogatory he saith:

I annex under the number 10 a statement of the drafts drawn from 1st September, 1909, to 7th March, 1910, on the Credit Havrais, by Steele, Miller & Company for account of Scheuch and Company.

All these acceptances were settled under the conditions of the interrogatory previous to the present.

Tenth cross-interrogatory:

To what extent is Scheuch & Company indebted to your bank at this time and what security have you for any such indebtedness?

To the tenth cross-interrogatory he saith:

The Extract of the Account-Current of Scheuch & Company that I have annexed under number 8, is answering to the question of this interrogatory.

Eleventh cross-interrogatory:

Attach to your depositions a statement of your acceptances against American cotton during the season of 1909 and 1910, that is, beginning from September 1, 1909, and ending August 31, 1910. What was the total amount of drafts accepted by you during the cotton seasons of 1909 and 1910 against American cotton?

1285 To the eleventh cross-interrogatory he saith:

The professional secret prevents me to give the statement which is asked to me by this interrogatory.

I can, however, without inconvenience, declare that during

the season 1909-1910, the Credit Havrais has accepted drafts drawn on it, for 140,839 bales cotton for a total value of fcs. 50,761,377.87.

Twelth cross-interrogatory:

When did you last accept any cotton drafts for account of Scheuch & Company drawn by Steele, Miller and Company, or Knight, Yancey & Company ?

To the twelfth cross-interrogatory he saith:

The last acceptance of the Credit Havrais to the drafts of Steele, Miller & Company, was given the 7th of March, 1910.

Concerning Knight, Yancey & Company no draft was issued by that firm, during the season 1909-1910, for account of Scheuch and Company.

Thirteenth cross-interrogatory:

Did you limit acceptances for Scheuch & Company? If you state that you limited Scheuch & Company in the amount of acceptances for account, give your reason for not continuing to accept, and did you at the same time discontinue accepting cotton drafts for other houses?

To the thirteenth cross-interrogatory he saith:

The drawings of Steele, Miller & Company were resulting of an agreement between the Credit Havrais and Scheuch & Company for a determined number of bales of cotton.

This agreement has never been dissolved by the bank, and in the time of the suspension of Steele, Miller & Company, said house had yet an authorization for one thousand bales of cotton for the amount of which, the said firm could have drawn on the Credit Havrais.

It was also the same for the other customers of the Credit Havrais, whose operations were continued for the quantities of cotton agreed to.

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Fourteenth cross-interrogatory:

At the time of the failure of Knight, Yancey & Company had you accepted for account of Scheuch & Company, or any other party, drafts of Knight, Yancey & Company. If you answer yes, annex to your deposition a statement of each draft, together with a statement of the bills of lading attached

to these drafts, and state whether or not these obligations have been paid and by whom, or whether or not you now hold same.

To the fourteenth cross-interrogatory he saith:

At the time of the failure of Knight, Yancey & Company the Credit Havrais had no acceptance open, drawn by said firm.

Fifteenth cross-interrogatory:

Was your bank aware of the delay in the arrival of the cotton for which it had accepted drafts of Knight, Yancey & Company and Steele, Miller & Company?

To the fifteenth cross-interrogatory he saith:

The Credit Havrais was looking after the arrival of the cotton concerning its bank, and was establishing that, since two seasons, the delays of transportation was always increasing; this fact, however, was not particular to it; all the receivers were in the same case, and Messrs. Scheuch & Company, called upon this subject, answered that the delay ought to be caused by congestion of the railway's stations, and at the ports.

Sixteenth cross-interrogatory:

If you answered yes to the fifteenth cross-interrogatory state whether or not you made any complaint as to these delays to the steamship lines, and if you should answer yes, state whether the complaints were made verbally or in writing, and if you answer the complaint was made verbally, state to whom made and in the presence of whom, and if you answer the complaint was made in writing, annex to your deposition copies of the complaints, together with the replies you received, and submit the originals to the authority taking these depositions that he may compare them with the copies and certify the copies as being correct.

1287 To the sixteenth cross-interrogatory he saith:

I have not addressed any cliam [claim] to the line of steamers.

Seventeenth cross-interrogatory:

During the latter part of January or the early part of

February, 1910, did you not stop the line of credit extended to Scheuch & Company by way of acceptances. If you answer yes, state why you stopped said line of credit, and state whether or not you gave notice of this fact to Scheuch & Company. If you answer yes, state whether said notice was verbal or in writing. If verbal, give the date or dates when given, to whom and in the presence of whom. If you gave such notice in writing, attach to your depositions a copy of such notice or notices and submit the originals to the authority taking these depositions to the end that he may compare same with these copies and verify them as being correct.

To the seventeenth cross-interrogatory he saith:

As I have declared in the cross-interrogatory number 13, the Credit Havrais at no moment stopped the reimbursement credit opened to Scheuch and Company.

Eighteenth cross-interrogatory:

Under the direct interrogatory number twenty-one you have been asked to explain the circumstances of your receipt of the custody bills of lading. In answering this interrogatory you will annex all correspondence that you may have had with Scheuch & Company, or any one else on the subject; you will state whether or not you made any inquiry of the Compagnie Generale Transatlantique as to how two sets of bills of lading for the same cotton could be in existence at the same time. If you state that you made inquiry of the Compagnie Generale Transatlantique or any source other than Scheuch & Company, you will state whether this inquiry was verbal or in writing; if you answer verbal, state the date or dates when made, to whom the inquiry was addressed and in the presence of whom, and if you answer this inquiry was made in writing, you will attach to your deposition a copy of the communications written by you and received in reply, and you will submit the originals to the authority taking these depositions to the end that he may compare them with the copies and certify the copies as being correct.

1288 To the eighteenth cross-interrogatory he saith:

The explanations that I have given to the direct interrogatory under number 19, fully answer to the question made by this cross-interrogatory, relatively to the custody bills

of the Compagnie Generale Transatlantique, to which I did not address any question about this document.

Nineteenth cross-interrogatory:

Under the eleventh cross-interrogatory you have been asked to state the amount of business done by you in accepting cotton bills of lading in the season of 1909 and 1910. You will state at this time whether or not in any of these transactions you permitted the substitution of custody bills of lading for through bills of lading. If you answer that you did, you will give the names of the firms by which this substitution was performed, the dates of the drafts, the amounts of the drafts, the dates of the through bills of lading and the dates of the custody bills of lading. We charge you that we are not discussing captains or mates receipts, but are asking solely, if in your experience with American cotton shippers other than Steele, Miller & Company, any case has ever arisen by which port bills of lading and custody bills of lading were in existence for the same cotton, and at the same time that the original bills of lading were in your possession. You will answer this question fully, and, as stated above, you will give the names of any American cotton houses by, with and through whom any such transactions occurred.

To the nineteenth cross-interrogatory he saith:

During the season 1909-1910, as well as during the previous seasons, no other firm besides Steele, Miller & Company did ever remit to us custody bills to be exchanged against through bills of lading.

Twentieth cross-interrogatory:

You have previously been asked whether or not you had any dealings with Knight, Yancey & Company and whether or not you held in your possession any accepted drafts of Knight, Yancey & Company about the time of the failure of Knight, Yancey & Co. If you answered yes, state whether or not when the failure of Knight, Yancey & Com-
1289 pany was announced you made any inquiry concerning the cotton presumably covered by your bills of lading, and if you answer that you did, attach to your depositions copies of the inquiries, together with the replies thereto.

To the twentieth cross-interrogatory he saith:

As I have declared previously, the failure of Knight, Yancey and Company, was without interest for the Credit Havrais.

Twenty-first cross-interrogatory:

Did you or did you not know at the time of the failure of Knight, Yancey and Company, that the said firm of Knight, Yancey & Company had carried on its business by forging bills of lading, and if you answer yes, state whether or not this was a matter of general knowledge at Havre at that time.

To the twenty-first cross-interrogatory he saith:

At the time of the suspension of Knight, Yancey and Company the fraudulent acts of this house were absolutely unknown in Havre.

Twenty-second cross-interrogatory:

Did you have any conversation with C. H. G. Linde of Steele, Miller & Company between January and May, 1910, and if you say that you did, repeat this conversation.

To the twenty-second cross-interrogatory he saith:

I don't know Mr. C. H. G. Linde, who did not pay me a visit when he came to Havre at the beginning of 1910.

Twenty-third cross-interrogatory:

File as an exhibit to your deposition all correspondence, telegraphic or otherwise, that passed between your bank and Scheuch & Company, and between your bank and any American firm or individual, between January and May, 1910, inclusive, with reference to the business of Steele, Miller & Company, or Knight, Yancey & Company. Attach as an exhibit all correspondence, telegraphic or otherwise, that passed between your bank and Scheuch & Company and the German-American National Bank of New Orleans, or A. Breton, its vice-president, or the Whitney Central National Bank of New Orleans, or the Canal-Louisiana Bank and Trust Company of New Orleans, or the Hibernia Bank and Trust Company of New Orleans, or any other bank or banker, between April 18, 1910, and May 15, 1910.

1290 To the twenty-third cross-interrogatory he saith:

I sent no telegraphic dispatch to any banks or any commercial firms in America relatively to the affair of Steele, Miller & Company between the dates mentioned.

Twenty-fourth cross-interrogatory:

State whether or not you permitted Scheuch & Company to make a habit of swapping bills of lading in all transactions had between you, and state when for the first time you permitted the substitution of said bills of lading. When you have fixed the date of the first substitution, state what you did with the supposed original through bills of lading. Did you return them to Scheuch & Company, and if so, did you take a receipt or writing from Scheuch & Company, and if you answer yes, annex to your deposition a copy of any receipt or writing which you may have taken from Scheuch & Company.

To the twenty-fourth cross-interrogatory he saith:

The exchange of bills of lading was done twice through Messrs. Scheuch and Company on the following dates, as it is proved by their memorandums which I annex under numbers 11 and 12:

13th of January for 100 bales of cotton, &
24th of March for 800 bales of cotton.

These port or custody bills of lading, that the Credit Havrais received, were always considered as a continuation of the through bills of lading accompanying the drafts, and as such, they have not retained our attention.

The through bills of lading then were remitted to Messrs. Scheuch & Company, upon their demand, without requiring receipts from them.

Twenty-fifth cross-interrogatory:

What other firm besides Steele, Miller & Company ever engaged in this business of exchanging bills of lading for the same cotton or for any other article? State specifically the name of any firm or individual, except Steele, Miller & Company, which substituted bills of lading covering the same cotton without filing evidence of the fact that it was done by and with the consent of the transportation company.

1291 To the twenty-fifth cross-interrogatory he saith:

I don't know any firm having exchanged bills of lading for the same merchandise; referring, furthermore, to my previous answer.

Twenty-sixth cross-interrogatory:

State whether you permitted the swapping of bills of lading by Knight, Yancey & Company and what official of your bank permitted it to be done.

To the twenty-sixth cross-interrogatory he saith:

The firm of Knight, Yancey & Company never asked to [of] the Credit Havrais exchange bills of lading.

Twenty-seventh cross-interrogatory:

State further what official of your bank permitted the substitution of bills of lading by Steele, Miller & Company. In answering this question, mention the exact transaction in which this proceeding took place.

To the twenty-seventh cross-interrogatory he saith:

I personally have authorized the delivery of the through bills of lading claimed, and I beg to refer in this respect to my answer to the Cross-Interrogatory Number 24.

Twenty-eighth cross-interrogatory:

File as an exhibit to your deposition all correspondence, telegraphic or otherwise, which you had with the Compagnie Generale Transatlantique between January 1, 1910, and June 30, 1910, touching movements of cotton by Steele, Miller & Company and Knight, Yancey & Company. Submit the originals to the authority taking these depositions that he may compare them with the copies and certify the copies as being correct.

To the twenty-eighth cross-interrogatory he saith:

Between the dates stated, I have exchanged with the Compagnie Generale Transatlantique only a letter relative to the discharging of the 100 bales S. R. U. I. by order of the Court.

I annex a copy of said letter under the number 13.

Twenty-ninth cross-interrogatory:

Give the date that you exchanged the bill of lading attached

to the draft accepted by you for the one hundred bales of cotton marked SRUI for the custody bill of lading; give the hour of the day, the name of the individual who delivered the bill of lading and a copy of the entry made on your books of this transaction. Permit the authority taking
1292 these depositions to examine the original books to the end that he may compare them with the copy and certify the copy as being correct. State whether or not you still hold both the through bill of lading and the custody bill of lading. If you answer that you do, state whether at the time of previous exchanges you surrendered the through bills of lading, and if you answer yes, explain why you considered it necessary to retain both original and through bill of lading at this particular time.

To the twenty-nine cross-interrogatory he saith:

As I have declared to the number 19 of the direct interrogatory, it is on the 7th of May, 1910, that Steele, Miller & Company handed to the Credit Havrais, through Scheuch & Company the custody bill of the S. R. U. I.—100 bales cotton per "Texas."

This document was not exchanged but annexed to the original bill of lading, and these two pieces, since then, remained in the possession of the Credit Havrais.

I cannot furnish a copy of any book in which the custody bill was entered, because the letter of Messrs. Scheuch & Company, annexed to my deposition, is the only evidence for the date.

Thirtieth cross-interrogatory:

Attach to your depositions a copy of the charter and by-laws of your corporation. It may be that you do not understand the words charter and by-laws. What we desire you to attach is a copy of the authority by which your corporation exists, together with the rules of business of your corporation.

To the thirtieth cross-interrogatory he saith:

Under number 14 I annex to this cross-interrogatory a copy of the Credit Havrais statutes.

Thirty-first cross-interrogatory:

Is it a custom of the banks doing business in France, and

particularly your bank, to speculate in cotton, grain, sugar or other such commodities?

To the thirty-first cross-interrogatory he saith:

It is not the custom in France that the banks speculate, and, particularly, the Credit Havrais does not speculate.

1293 Thirty-second cross-interrogatory:

Are you acquainted with the following institutions: Paul Chardin, Bank de Mulhouse, Comptoir d'Escompte de Mulhouse and Societe Generale?

To the thirty-second cross-interrogatory he saith:

I know the firm Paul Chardin, and also the agencies of the Banque de Mulhouse, Comptoir d'Escompte de Mulhouse, and Societe Generale.

Thirty-third cross-interrogatory:

If you answer yes, state whether you know if it is a custom of all, or any of them, to speculate in cotton, grain, sugar or other commodities by direct purchases from the American merchants, and then protect these purchases by buying or selling cotton futures.

To the thirty-third cross-interrogatory he saith:

I think that the firm Paul Chardin do not speculate, but I can affirm that the agencies of Societies of Credit don't engage them in any speculative operation.

Thirty-fourth cross-interrogatory:

If so, state each and every case in which your bank has bought or sold cotton, sugar or grain?

To the thirty-fourth cross-interrogatory he saith:

The Credit Havrais never has bought merchandises for its own account.

Thirty-fifth cross interrogatory:

If you answer that you purchased cotton or other commodities, state how many bales you purchased in the last year; what facilities you have for receiving and storing such cotton. Give the name of the man or men in charge of your spot

cotton department. Give the names of the parties from whom you have purchased cotton and the parties to whom you have sold cotton. Attach copies of all account sales and generally enlighten us as to the method of carrying out your cotton department.

To the thirty-fifth cross-interrogatory he saith:

It is answered by the previous cross-interrogatory.

Thirty-sixth cross-interrogatory:

If you say you purchased other commodities in the open market and sold same in the open market, give a full statement of these speculations.

1294 To the thirty-sixth cross-interrogatory he saith:

Same answer.

Thirty-seventh cross-interrogatory:

In the above styled cause, Elisee Paul Dubois filed an affidavit in which he makes oath as follows:

"Prior to the year 1909, the business of the Societe Generale with Scheuch & Company was small and unimportant. In 1909 the bank extended its engagement d'importation with that firm to 5,000 bales of cotton, that is to say, it authorized that firm to have drafts drawn on it for the purchase price of cotton accompanied by documents giving it title to the cotton, provided draft drawn outstanding at any one time should not exceed 5,000 bales. The arrangement included the sale of futures in the name of the bank, contemporaneously with the drawing of each draft and corresponding in amount and price with the cotton purchased. The bank had had no concern with or knowledge of the contracts or arrangements between Scheuch & Company and the shippers of cotton and extended no credit to the shippers."

Please state whether or not this statement would be correct if applied to your bank instead of the Societe Generale. State whether or not your dealings concerning this cotton were under the terms and conditions described by Mr. Dubois, correcting of course any defects in figures as to the number of bales forming the basis of the credit.

To the thirty-seventh cross-interrogatory he saith:

The affidavit of E. P. Dubois, Esquire, director of the

Societe Generale's Agency, is exact and can be applied entirely to the operation of the Credit Havrais with the firm of Scheuch and Company, with, however, the difference only, that the credit in number of bales at the moment of the suspension of Steele, Miller & Company amounted to 8,000 bales; as much in warehouse, as in sea.

Thirty-seventh cross-interrogatory:

Affidavits made by the witnesses for the Societe Generale, Bank de Mulhouse, Comptoir d'Escompte de Mulhouse and Paul Chardin set forth the following statement:

On April 20th it was reported in Liverpool that Knight, Yancey & Company were in difficulties, and this report was known at Havre on April 21, 1910. There was no report or rumor then in respect to Steele, Miller & Company. On Saturday evening, April 23rd, Scheuch & Company received from Bremen a telegram stating that a bank of that city refused to accept drafts of Steele, Miller & Company, and they communicated this to the Societe Generale with the statement that the refusal of the Bremen house was as
1295 a matter of precaution, on account of the frauds of Knight, Yancey & Company, but without any knowledge that Steele, Miller & Company had acted in the same manner. We asked Scheuch & Company to cable Steele, Miller & Company for information. In the meantime, on April 26th, there arrived the said custody bills of ladings, and, pending further information, we decided to hold both the custody bills of lading and the through railroad bills of lading. Afterwards, on the evening of April 26th, a house at Havre received from New Orleans a cable announcing the failure of Steele, Miller & Company, but the next day that house received a cable from the same correspondent telling it not to reveal the telegram of the day before because it had not been confirmed. Finally, on April 29th, Scheuch & Company received from Steele, Miller and Company advice by cable that they had suspended.

Please state whether this is correct.

To the thirty-eight cross-interrogatory he saith:

The declaration exposed in the affidavit of Messrs. Paul

Chardin and of the directors of the agencies of Societe Generale Banque de Mulhouse, and Comptoir d'Escompte de Mulhouse, is exact. (Signed) J. CASTEL.

(Signed) J. P. BEECHER,
[Seal] Commissioner.

1296 City of Havre,
Republic of France. ss.

I, J. P. Beecher, Vice Consul of the United States of America, at Havre, France, do certify that J. Castel, the witness, personally appeared before me on the 30th day of September, 1911, at 2 o'clock in the afternoon, at the Consulate of the United States at Havre, in the Republic of France, and, after being duly sworn, to testify the truth, the whole truth, and nothing but the truth, did depose to the matter contained in the foregoing deposition, and did in my presence, subscribe the same and certify to the authenticity of the exhibits. I certify that I have subscribed my name to each half sheet thereof, and further certify that according to cable instructions sent to Messrs. Scheuch & Co., of Havre, France, on September 4, 1911, by J. P. Blair, attorney, the attestation of each exhibit has, (in view of their great number), been waived.

Witness my hand and official seal, the day and year above written. (Signed) JOHN PRESTON BEECHER,
Vice Consul of the United States
of America, at Havre, France.

Deposited in the postoffice at Havre, France, this 11 day of October, 1911.

(Signed) JOHN PRESTON BEECHER,
[Seal] Vice Consul of the United States
of America, at Havre, France.

(Twelve $2.50 American Consular Service
(Fee Stamps, each stamped across face with
(red ink, 30 Sep. 1911.

Consular fee	$30.00
Services of clerk for copying deposition..	27.50
Total	$57.50

them to the bank in exchange for the false through
1322 bills of lading annexed to the drafts.

Shortly after shipping the cotton, and before it had actually left the United States, Steele, Miller & Company were adjudicated bankrupts and their trustee brought his bill of complaint against the Bank of Mulhouse, against Scheuch & Company, and against the Compagnie Generale Transatlantique and its agent at New Orleans, the Texas Transport & Terminal Company, in whose custody the cotton then was, to recover the said 900 bales of cotton, on the ground that the shipment constituted a voidable preference.

For reasons previously filed, a preliminiary injunction issued, restraining the carrier from removing the cotton out of the jurisdiction of this Court, but the bank was permitted to take over the cotton on bond. So, for the purposes of this decree, Scheuch & Company and the carrier and its agent may be considered nominal parties.

It is contended by the bank that the transaction between it and Steele, Miller & Company is in the nature of a sale, and that, by marking the cotton and shipping it, Steele, Miller & Company appropriated it to the contract before bankruptcy; that Steele, Miller & Company did not intend to create a preference, and that, even if they did, the bank did not know, and had no notice, constructive or actual, of the insolvency of Steele, Miller & Company and an attempt to prefer it.

But the trustee contends that Steele, Miller & Company substituted good collateral for documents of no value, and thereby created a voidable preference, which he is suing to set aside and as trustee he is not estopped. I cannot agree with these contentions.

The method of doing business which the parties had adopted was as follows: Steele, Miller & Company would consign their cotton to Scheuch & Company on negotiable bills of lading to their own order and annex these bills, properly indorsed, together with other documents usual in the cotton trade, to drafts drawn on the various banks at Havre
1323 with whom Scheuch & Company had previously arranged for credits. The banks would accept and ultimately pay these drafts and hold the cotton as security for their reimbursement. Scheuch & Company would sell futures against the cotton to protect the banks from market fluctua-

tions, and in the usual course of business would dispose of the cotton after it arrived, and then reimburse the banks. The banks would then release the cotton to Scheuch & Company or the purchaser.

Under this arrangement, it seems to me that Steele, Miller & Company parted with the ownership and control of the cotton the moment they shipped it and drew on the bank for its value. And it will be noted in this connection that the drafts are to be charged to account of the cotton and not to the account of Steele, Miller & Company. Steele, Miller & Company at times remitted funds to Scheuch & Company in settlement of their mutual accounts, but these were to reimburse the banks for losses on the out-fall of the cotton, such as differences in grade or weight, for which they were of course liable, or to take up drafts that had been drawn in excess of their line of credit. I can see no difference in principle between these transactions and out and out sales.

When Steele, Miller & Company had obtained the bank's money by falsely pretending they had shipped the cotton against which the draft was drawn, and on the faith of which purported shipment the bank had accepted and paid the draft, there is no reason why they could not afterwards appropriate the actual cotton to the contract, and by shipping it, consigned and marked precisely as represented in the forged bills of lading, they did so. The Idaho, 93 U. S. 575. It is immaterial in this case they took out port, instead of through bills of lading. It was immaterial what they might do with the genuine bills of lading, provided no rights of innocent third persons were affected. That they sent them to the bank to be substituted for the forged ones but strengthens the facts showing appropriations. It did not constitute a
1324 change of securities.

Steele, Miller & Company appropriated the cotton to the contract and the transaction was entirely complete before bankruptcy. They would have been estopped to assert any claim to it, and the trustee is in no better position.

While I do not consider the question of voidable preference is presented in this case, and prefer to rest my decision on the above reasons, perhaps it is but fair to the defendant to say that I am not convinced that Steele, Miller & Company intended a preference, as it seems to me they uniformly discounted drafts purporting to be secured by bills of lading for

cotton, which were in reality forged, and thereafter shipped the cotton to prevent discovery of their dishonest methods, and that their transactions with the banks were in the usual course of business and without any intention on their part other than to conceal their true methods. Furthermore, while the facts on which they might be charged with notice ought to have excited the suspicion of the bank, I am not prepared to say that they had knowledge, constructive or actual, of Steele, Miller & Company's insolvency, or that a preference was intended. Tumlin vs. Bryan, 165 Fed. 168.

There will be a decree in favor of the bank, adjudging it to be the owner of the cotton and dismissing the bill as to it, but the bill will be retained for further proceedings on other branches of the case.

1325 DECREE.

Entered and Filed January 1, 1912.

United States District Court, Eastern District of Louisiana.

J. A. E. Pyle,

vs. No. 14,240

Bank of Mulhouse, Compagnie Generale Transatlantique, Texas Transport and Terminal Company, and Scheuch and Company.

In equity.

Decree.

This cause came on to be heard at this term and was argued by counsel and taken under advisement by the Court, and, upon consideration thereof, it is now ordered, adjudged and decreed, as follows, viz.:

That complainant's bill be and it is hereby dismissed as to defendant, the Bank de Mulhouse, at cost of complainant, to be taxed; that the injunction pendente lite heretofore issued in this cause be, and the same is hereby, dissolved; and that the Bank of Mulhouse be, and the same is hereby, declared to be the owner of the cotton referred to in the bill of com-

plaint and covered by the bond herein given; and that the demands of the complainant against the said Bank of Mulhouse be denied.

The Court hereby expressly reserves for further consideration all matters not herein expressly provided for, including the rights and claims of the Compagnie Generale Transatlantique against complainant and the rights and claims of all parties defendant, under the injunction bonds herein given, as well against the sureties on said bonds as against the complainant, and as to all such matters the bill is retained for further proceedings.

(Signed) RUFUS E. FOSTER, Judge.

January 1st, 1912.

1326 PETITION AND ORDER FOR APPEAL.

Filed March 1st, 1912.

United States District Court, Eastern District of Louisiana.

J. A. E. Pyle, Trustee,
versus No. 14,240
Texas Transport & Terminal Company, et als.

The petition of J. A. E. Pyle, trustee, complainant in the above numbered and entitled cause, with respect represents:

That complainant considers himself aggrieved by the decree made and entered in this cause on the 1st day of January, 1912, and,

That he desires and hereby appeals from said decree to the United States Circuit Court of Appeals for the Fifth Circuit, and presents herewith, and makes part of this petition, as Exhibit "A" hereto, assignments of error in said decree.

Wherefore, the premises considered, petitioner prays that his appeal may be allowed to operate as a supersedeas upon the giving of a bond with surety in an amount to be fixed by the Court, and conditioned according to law; and that a transcript of the whole record, proceedings, testimony and papers upon which said decree was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the

Fifth Circuit, in the manner and form and at the time prescribed by law, and by the practice of said Court; that citation issue to Bank de Mulhouse, through its solicitors of record, Denegre and Blair; to Compagnie Generale Transatlantique, through its agent, W. H. Hendren; to the Texas Transport & Terminal Company, through its agent, W. H. Hendren, in the manner and form prescribed by law; for a correction of said errors and a reversal of said decree, and for such other and further relief as may be proper in the premises.

(Signed) W. A. PERCY.
(Signed) DUFOUR & DUFOUR,
Solicitors.
3/1/12 (Signed) DENEGRE & BLAIR,
Solrs.
(Signed) GEO. H. TERRIBERRY,
Sol. for Compagnie Generale Transatlantique
and Texas Transport & Terminal Co.

1327 ORDER.

Considering the foregoing petition, it is ordered that an appeal be allowed to the said complainant, returnable to the United States Circuit Court of Appeals for the Fifth Circuit, within thirty days from the date thereof, and that same operate as a supersedeas upon the said complainant furnishing bond with a good and solvent surety, according to law, in the sum of two hundred dollars.

(Signed) RUFUS E. FOSTER, Judge.

Mar. 1/12.

1328 ASSIGNMENT OF ERRORS.

Filed March 1st, 1912.

United States District Court, Eastern District of Louisiana.

J. A. E. Pyle, Trustee,
versus No. 14240.
Texas Transport & Terminal Company, et als.

Assignments of Error.

Now comes J. A. E. Pyle, trustee in bankruptcy of Steele, Miller & Company, appellant, by his attorney, and says that, in the record and proceedings aforesaid, of the United States District Court for the Eastern District of Louisiana, in the above entitled cause and in the decree therein rendered on the 1st day of January, 1912, manifest error hath intervened to the prejudice of said appellant, in this, to-wit:

(1) The Court erred in rendering and entering a decree dismissing the bill of complaint of J. A. E. Pyle, trustee in bankruptcy of Steele, Miller & Company.

(2) The Court erred in rendering and entering a decree in favor of the defendant.

(3) The Court erred in holding that the Bank of Mulhouse was the owner of the cotton described in the bill of complaint and covered by the bond herein given.

(4) The Court erred in holding that, by delivering the actual cotton to the carriers, Steele, Miller & Company intended to appropriate, and did appropriate, said cotton to the fraudulent bills of lading theretofore acquired and held by the defendant, the Bank of Mulhouse.

(5) The Court erred in holding that the defendant bank was in fact a purchaser of actual cotton from Steele, Miller & Company.

(6) The Court erred in failing to find and hold that the de-

fendant knew, or ought to have known, or had reasonable grounds to believe, that Steele, Miller & Company were insolvent at the time the defendant received the genuine bills of lading representing cotton actually shipped, referred to in the bill of complaint.

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(7) The Court erred in failing to find and to hold that Steele, Miller & Company, by delivering the genuine bills of lading to the defendant representing cotton actually shipped, thereby intended to prefer and did prefer said defendant to and over its other creditors and thereby intended to grant, and did grant, an illegal and unfair preference to the defendant, and that the defendant did receive a preference within the meaning and intendment of the bankrupt statute of the United States.

Wherefore, the said J. A. E. Pyle, trustee in bankruptcy of Steele, Miller & Company, appellant, prays that for the errors aforesaid and other errors appearing in the record in the above entitled cause to the prejudict [prejudice] of appellant, the said decree be reversed and annulled and that appellant be granted such relief as may be proper, and appellant shall ever so pray.

(Signed) W. A. PERCY,
DUFOUR & DUFOUR,
Solicitors.

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BOND.

Filed March 1st, 1912.

United States District Court, Eastern District of Louisiana.

J. A. E. Pyle, Trustee,
versus No. 14240.
Texas Transport and Terminal Company, et als.

Know all men by these presents, that we, J. A. E. Pyle, trustee in bankruptcy of Steele, Miller & Company, as principal, and Southwestern Surety Insurance Company, of Oklahoma, as sureties, are held and firmly bound unto The Texas Transport & Terminal Company, Compagnie Generale Trans-

atlantique, the Bank de Mulhouse in the full and just sum of two hundred dollars, to be paid to the said Texas Transport & Terminal Company, Compagnie Generale Transatlantique, Bank de Mulhouse, certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 1st day of March, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said court, between J. A. E. Pyle, trustee, and the Texas Transport & Terminal Company, et als., number 14240 of the docket of said court, a decree was rendered against the said J. A. E. Pyle, trustee, and the said J. A. E. Pyle, trustee, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Texas Transport & Terminal Company, Compagnie Generale Transatlantique, Bank de Mulhouse, citing and admonishing them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such that if the said J. A. E. Pyle, trustee, shall prosecute said appeal to effect, and answer all damages and costs if he fail to
1331 make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) J. A. E. PYLE, Trustee,
By WM. C. DUFOUR,
[Seal] His Solicitor & Attorney.
(Signed) SOUTHWESTERN SURETY INS. CO. OF OKLA.,
By J. H. BODENHEIMER,
[Seal] Agent & Atty. in Fact.

Approved by—
(Signed) RUFUS E. FOSTER, Judge.

1332 STIPULATION.

Filed May 30, 1912.

United States District Court, Eastern District of Louisiana.

J. A. E. Pyle, Trustee,
versus
Texas Transport & Terminal Co., et als.

Nos. 14,240, 14,241, 14,242, 14,243 and 14,277.

It is agreed between the counsels herein that the transcript in the within numbered and entitled causes shall be filed in the office of the clerk of the Court of Appeals as soon as same can be completed, it being distinctly understood that said transcript shall be filed not later than thirty days from this date.

New Orleans, La., May 28, 1912.

(Sig.) DENEGRE & BLAIR,
Solicitors for Havre Banks.

1333 PRAECIPE FOR TRANSCRIPT OF APPEAL.

Filed June 28, 1912.

United States District Court, Eastern District of Louisiana.

J. A. E. Pyle, Trustee,
versus
Texas Transport and Terminal Company, et als.

Nos. 14,240, 14,241, 14,242, 14,243 and 14,277.

New Orleans, La., April ——, 1912.

To H. J. Carter, Esq.,
Clerk United States District Court.

Dear Sir:

In making up the transcript of appeal in the case numbered 14,240 of the docket, entitled as above, you will include therein the following, to-wit:

Bill of complaint, exhibits annexed, and order on bill.

Subpoenas in chancery and return thereon.

Restraining order and return thereon.

Appearance of Texas Transport & Terminal Co. and Compagnie Generale Transatlantique.

Appearance of Bank de Mulhouse.

Note of evidence on behalf of Texas Transport & Terminal Co. and Compagnie Generale Transatlantique.

Affidavit of Wm. H. Hendren.

Note of evidence on behalf of Bank of Mulhouse.

Affidavits of Frans Lysell, Elisee Paul Dubois, Emile Level, Alphonse Riss, Albert Schilling, Frans Lyzell, Albert Schilling, Ferdinand Scheuch.

Note of evidence on behalf of complainant.

Affidavits of Elmer E. Clerk, C. H. G. Linde, Edward S. Elliott, Wm. C. Dufour, Andrew J. Lafargue, Andrew J. Lafargue, Wm. C. Dufour, William C. Dufour.

Opinion of the Court.

Decree on application for injunction.

Injunction to Texas Transport & Terminal Co. and Compagnie Generale Transatlantique, and return thereon; bonds.

Motion of Bank of Mulhouse for extension of time, &c.

Motion of complainant to sell cotton, and return thereon.

Demurrer of Bank of Mulhouse to jurisdiction.

Motion of complainant to set down for argument demurrer of Bank of Mulhouse.

Order overruling demurrer.

Proceedings on motion of Bank of Mulhouse to have complainant furnish additional bonds, etc., and bond.

Proceedings on rule of Bank of Mulhouse to release cotton on bond, etc., and bond.

Answer of Bank of Mulhouse.

Replication to answer of Bank of Mulhouse.

Motion and order in re taking of testimony and agreement.

Petition for writ of habeas corpus ad testificandum.

Writ of Habeas corpus ad testificandum and return thereon.

Motion and order to warden in re C. H. G. Linde.

Answer of Texas Transport & Terminal Co. and Compagnie Generale Transatlantique.

Amended answer of Texas Transport & Terminal Co., et al.

Minute entries of hearings, etc.

Complainant's note of evidence.

Stipulation as to taking of evidence in the case.

Stipulation as to claims for damages set up in answers of Texas Transport & Terminal Co., et al.

Stipulation as to testimony of W. E. Kennedy.

1334 Testimony taken on behalf of complainant.

Exhibits offered in connection with testimony on behalf of complainants, and referred to in complainant's note of evidence.

Notes of evidence on behalf of all of the defendants.

Testimony, depositions and documentary evidence offered on behalf of all of the defendants.

Letter from Frank H. Mortimer, clerk, to Compagnie Generale Transatlantique, that all injunctive orders, etc., are released and dissolved.

Opinion of the Court.

Decree.

Motion and order for appeal.

Assignments of error.

Bond for appeal.

In the cases entitled and numbered—

J. A. E. Pyle, Trustee,
versus
Texas Transport & Terminal Co., et als.

Nos. 14241, 14242, 14243 & 14277.

the following are to be copied into the transcripts of appeal in said cases, to-wit:

Bill of complaint, exhibits attached and order thereon.

Subpoenas in chancery and returns thereon.

Restraining order and return thereon.

Appearances of defendants.

Special appearances of defendants.

Minute entries of hearings, etc.

Decree on application for injunction.

Injunction and return thereon.

All motions, and orders to show cause, etc.

Bond of trustee on injunction.

Demurrer.

Hearing and order overruling demurrer.
Answers.
Application to release cotton on bond, hearing and order on same.
Release bond.
Replications to answers.
Notes of evidence on behalf of complainant and the defendants.
Decree.
Appeal papers.
New Orleans, La., April ——, 1912.

(Signed) DUFOUR & DUFOUR,
Solicitors for J. A. E. Pyle, Trustee, Appellant.

1335 STIPULATION.

June 28, 1912.

United States District Court, Eastern District of Louisiana.

J. A. E. Pyle, Trustee,
vs. No. 14,240.
Texas Transport and Terminal Company, et als.

It is hereby stipulated and agreed, by and between the undersigned counsel, that copies or plates shall be made of the following documentary evidence offered and filed in the above entitled and numbered case and in cases numbered 14,241, 14,242, 14,243 and 14,277, entitled as above, for transmission to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, with the transcript of appeal in the case numbered 14,240, to-wit:

The drafts drawn by Steele, Miller & Company on the Bank de Mulhouse, on the Societe Generale, Credit Havrais, and on Paul Chardin, defendants.

It is further stipulated and agreed that the sheets of account in French, marked Exhibit No. 3, "24 feuilles," "Scheuch & Co.," and filed in case No. 14,242, November 20, 1911, shall be transmitted in the original, with a translation thereof, if

found necessary, to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, with the said transcript of appeal.

New Orleans, April 25, 1912.

(Signed) DUFOUR & DUFOUR,
Solicitors for Complainant, Appellant.
(Signed) DENEGRE & BLAIR,
Solicitors for Defendants, Appellees.

1336 AGREEMENT.

Filed June 28, 1912.

U. S. District Court, Eastern Dist. of La.

J. A. E. Pyle, Trustee,
versus
Texas Transport & Terminal Co., et als.

Numbers 14,240, 14,241, 14,242, 14,243 and 14,277.

Agreement.

It is agreed between the undersigned counsel for complainant and defendants that the transcripts of appeal in the within numbered causes shall be filed in the office of the clerk of the Court of Appeals not later than July tenth, one thousand, nine hundred and twelve.

N. O. 6/25/12.

(Signed) DENEGRE & BLAIR,
Solicitors for Havre Banks.
(Signed) DUFOUR & DUFOUR,
Solicitors for Complainant.

United States of America.

District Court of the United States, Eastern District of Louisiana.

Clerk's Office:

I, HENRY J. CARTER, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 1336 pages contain and form a full, complete, true and perfect transcript of the record, assignment of errors, and proceedings had, together with all the evidence adduced on the trial of the case of J. A. E. Pyle, Trustee, versus Texas Transport & Terminal Company, et als., No. 14,240 of the docket of the said Court, and also all of the evidence adduced on the trial of the cases, bearing the same title and numbered 14,241, 14,242, 14,243 and 14,277, of the docket of the said Court (made in accordance with the praecipe for the transcripts of appeal in the cases entitled as above and numbered 14,240, 14,241, 14,242, 14,243 and 14,277, copied at page, beginning at 1333 of this transcript), except the copies or plates of the drafts drawn by Steele, Miller & Company on the Bank de Mulhouse, the Societe Generale, Credit Havrais and on Paul Chardin, defendants, which copies or plates of said drafts are transmitted, with this transcript, to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, in accordance with the stipulation of counsel, copied at page 1335 of this transcript; and except the sheets of account in French, marked Exhibit No. 3, "24 feuilles," "Scheuch & Co.," and filed in case No. 14,242, November 20, 1911, which sheets of account are transmitted in the original to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, with the transcript of appeal, in accordance with said stipulation of counsel, copied at page 1335 of this transcript.

Witness my hand and the seal of said Court, at the City of New Orleans, Louisiana, this 10th day of July, A. D. 1912.

[Seal] H. J. CARTER, Clerk.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of March 20, 1913.

No. 2389.

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller & Company,
versus
TEXAS TRANSPORT & TERMINAL COMPANY, COMPAGNIE GENERALE TRANSATLANTIQUE, and BANK DE MULHOUSE.

On this day this cause was called, and, after argument by Wm. C. Dufour, Esq., for Appellant, and J. P. Blair, Esq., for Appellees, was submitted to the Court.

Opinion of the Court.

Filed April 8th, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2389.

J. A. E. PYLE, Trustee, etc.,
v.
TEXAS TRANSPORT & TERMINAL CO. et al. and BANK DE MULHOUSE.

No. 2390.

J. A. E. PYLE, Trustee, etc.,
v.
TEXAS TRANSPORT & TERMINAL CO. et al and COMPTOIR D'ESCOMPTE DE MULHOUSE.

No. 2391.

J. A. E. PYLE, Trustee, etc.,
v.
TEXAS TRANSPORT & TERMINAL CO. et al. and PAUL CHARDIN.

No. 2392.

J. A. E. PYLE, Trustee, etc.,
v.
TEXAS TRANSPORT & TERMINAL CO. et al. and SOCIETÉ GENERALE.

No. 2393.

J. A. E. PYLE, Trustee, etc.,
v.
TEXAS TRANSPORT & TERMINAL CO. et al. and CREDIT HAVRAIS.

Appeals from the District Court of the United States, Eastern District of Louisiana.

Before Pardee and Shelby, Circuit Judges, and Sheppard, District Judge.

By the COURT:

The appeals in the above numbered and entitled cases are affirmed on the authority of Lovell v. Newman & Son, 192 F. 753, and Hentz & Co., v. Lovell, Id. 762.

Judgment.

Extract from the Minutes of April 8, 1913.

No. 2389.

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller & Company,
versus
TEXAS TRANSPORT & TERMINAL COMPANY, COMPAGNIE GENERALE TRANSATLANTIQUE, and BANK DE MULHOUSE.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby affirmed;

It is further ordered, adjudged and decreed that the Appellant, J. A. E. Pyle, Trustee in Bankruptcy of Steele, Miller & Company, and the surety on the appeal bond herein, Southwestern Surety Insurance Company of Oklahoma, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

Petition for Rehearing.

Filed May 5th, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2389.

J. A. E. PYLE, Trustee,
versus
TEXAS TRANSPORT & TERMINAL COMPANY et als.

Application for Rehearing.

The petition of J. A. E. Pyle, trustee, appellant in the above entitled cause, represents:

That there is error to petitioner's prejudice in the decree rendered by this Honorable Court in this cause affirming the decree from which petitioner's appeal was prosecuted and for specification of error, petitioner says:

That the decree is based upon the authority of the cases of Lovell, Trustee, v. Isidore Newman, and Hentz v. Lovell, reported in 193 F., p. 753.

It is respectfully submitted that the issue involved in the present suit is separate and distinct from the issues involved and presented in the case under authority of which the Court has affirmed this decree, in that the cases cited invoked solely the issue of appropriation of property, while in the instant case, the Court had before it a direct charge of giving and receiving an unfair preference within the intendment of the Bankruptcy Statute, which issue was neither presented nor decided in the Lovell or Hentz cases; that, therefore, the authority cited cannot be held to control the present case.

Wherefore, petitioner prays that a rehearing may be granted in this cause, and that upon such hearing, the judgment appealed from be reversed and that judgment be rendered in favor of petitioner, granting the relief prayed for.

(Signed) WM. C. DUFOUR,
(Signed) H. GENERES DUFOUR,
Solicitors for Appellant.

The undersigned hereby certifies that he is one of the solicitors for J. A. E. Pyle, trustee, appellant in the above entitled and numbered cause, and that in his opinion the foregoing petition for rehearing is well founded in law.

(Signed) WM. C. DUFOUR.

Order Denying Rehearing.

Extract from the Minutes of June 2nd, 1913.

No. 2389.

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller & Company,
versus
TEXAS TRANSPORT & TERMINAL COMPANY, COMPAGNIE GENERALE TRANSATLANTIQUE, and BANK DE MULHOUSE.

Ordered that the petition for rehearing, filed in this cause, be and the same is hereby denied.

Petition for Appeal, and Order.

Filed July 3d, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2389.

J. A. E. PYLE, Trustee,
versus
TEXAS TRANSPORT & TERMINAL COMPANY et als.

The petition of J. A. E. Pyle, Trustee of Steele, Miller & Company, Bankrupts, with respect shows:

That the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit and that a decree has been herein rendered on the 8th day of April, 1913, affirming the judgment of the District Court of the United States for the Eastern District of Louisiana; that the matter in controversy in said suit exceeds Three Thousand Dollars ($3000), besides interest and costs, and that the jurisdiction of none of the said Courts is, or was invoked, nor is or was dependant, upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; and that this cause does not arise under the patent laws nor the copyright laws, nor the revenue laws, nor the criminal laws of the United States, and that it is not an admiralty case and that it is a proper cause to be reviewed by the Supreme Court of the United States upon appeal.

Therefore, your petitioner respectfully prays that an appeal with Supersedeas be allowed in the above cause, and that the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit be directed to send the record and proceedings in said cause, with all things concerning same, to the Supreme Court of the United States in order that the errors complained of in the assignment of error herein filed by said appellant may be reviewed and if error be found corrected according to the laws and customs of the United States.

(Signed) WM. C. DUFOUR,
(Signed) H. GENERES DUFOUR,
Solicitors.

Order.

The foregoing petition is granted and the appeal allowed as prayed for upon appellant giving bond according to law in the sum of $250.00.

July 2d, 1913.

(Signed) DON A PARDEE, *Judge.*

Assignment of Errors.

Filed July 3d, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2389.

J. A. E. PYLE, Trustee,
versus
TEXAS TRANSPORT & TERMINAL COMPANY et als.

And now comes J. A. E. Pyle, Trustee in Bankruptcy of Steele, Miller & Company, Bankrupts, appellant, through William J. Lamb, William C. Dufour and H. Generes Dufour, his solicitors and says that in the record and proceedings aforesaid in the United States

Circuit Court of Appeals for the Fifth Circuit in the above entitled cause and in the rendition of the final decree therein manifest, error has intervened to the prejudice of said appellant in this, to-wit:

(1) The United States Circuit Court of Appeals for the Fifth Circuit erred in affirming the decree of the United States District Court for the Eastern District of Louisiana.

(2) The said United States Circuit Court of Appeals for the Fifth Circuit erred in not reversing the said decree of the United States District Court for the Eastern District of Louisiana.

(3) The said United States — Court of Appeals for the Fifth Circuit erred in failing to sustain appellant's Assignment of Error No. 4 upon the record of said case, as follows:

"That the Court erred in holding by delivering the actual cotton to the carriers, Steele, Miller & Company intended to appropriate and did appropriate said cotton to the fraudulent bills of lading acquired and held by defendant.

(4) The said United States Circuit Court of Appeals for the Fifth Circuit erred in failing to sustain appellant's Assignment of Error No. 5 upon the record of said case as follows:

"The Court erred in holding that the defendant bank was in fact a purchaser of actual cotton from Steele, Miller & Company."

(5) The said United States Circuit Court of Appeals for the Fifth Circuit erred in failing to sustain appellant's Assignment of Error No. 6 upon the record of said case, as follows:

"The Court erred in failing to find and hold that the defendant knew or ought to have known or had reasonable grounds to believe that Steele, Miller & Company were insolvent at the time the defendand received the genuine bills of lading representing cotton actually shipped referred to in the bill of complaint.

(6) The said United States Circuit Court of Appeals for the Fifth Circuit erred in failing to sustain appellant's Assignment of Error No. 7, upon the record of said case as follows:

"The Court erred in failing to find and to hold that Steele, Miller & Company, by delivering the genuine bills of lading to the defendant representing cotton actually shipped, thereby intended to prefer and did prefer said defendant to and over its other creditors, and thereby intended to grant and did grant an illegal and unfair preference to the defendant, and that the defendant did receive a preference within the meaning and intendment of the bankrupt statute of the United States."

Wherefore, said J. A. E. Pyle, Trustee, as aforesaid, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cause to the prejudice of the appellant, said decree of the United States Circuit Court of Appeals for the Fifth Circuit be reversed and annulled and that said cause be remanded to the United States District Court for the Eastern District of Louisiana, with instructions to set aside the decree heretofore rendered in the trial of this cause and commanding a new trial for same and such other proceedings in said cause as may be determined upon by

this Honorable Court to the end that justice may be obtained in the premises.

(Signed) H. GENERES DUFOUR,
(Signed) WM. C. DUFOUR,
Solicitors.

Bond on Appeal.

Filed July 7th, 1913.

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller & Company,
vs.
TEXAS TRANSPORT AND TERMINAL COMPANY, COMPAGNIE GENERALE TRANSATLANTIQUE, and BANK DE MULHOUSE.

Know all men by these presents, that we J. A. E. Pyle, Trustee in Bankruptcy of Steele, Miller & Company, as Principal, and Southwestern Surety Insurance Company as Surety, are held and firmly bound unto The Texas Transport and Terminal Company, Compagnie Generale Transatlantique and Bank de Mulhouse in the sum of Two Hundred and Fifty Dollars ($250.00), to be paid to the said, The Texas Transport and Terminal Company, Compagnie Generale Transatlantique and Bank de Mulhouse; we bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 3rd day of July, A. D. 1913.

Whereas, the Appellant in the above entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Fifth Circuit on the 8th day of April, 1913.

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) J. A. E. PYLE, *Trustee,*
By WM. C. DUFOUR, *Solicitor.*
(Signed) SOUTHWESTERN SURETY INSURANCE CO. OF OKLAHOMA, [SEAL.]
By J. H. BODENHEIMER,
Agent and Attorney-in-Fact.

The foregoing bond is approved this 4th day of July, A. D. 1913.

(Signed) DON A. PARDEE,
United States Circuit Judge, Fifth Circuit.

Order to Transmit Certain Exhibits in the Original.

Filed July 7th, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2389.

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller & Company, Appellant,
versus
TEXAS TRANSPORT & TERMINAL COMPANY, COMPAGNIE GENERALE TRANSATLANTIQUE, and BANK DE MULHOUSE, Appellees.

On motion of Dufour & Dufour, Attorneys for appellant—
It is ordered by the Court that the original exhibits transmitted to this Court with the transcript of record and filed therewith be forwarded to the Supreme Court of the United States in the original.
(Signed) DON A. PARDEE, *Judge.*

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 853 to 870 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2389, wherein J. A. E. Pyle, Trustee in Bankruptcy of Steele, Miller & Company, is appellant, and The Texas Transport & Terminal Company, Compagnie Generale Transatlantique, and Bank de Mulhouse are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 852 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

I further certify that the exhibits, forwarded to this Court in the original, are ordered to be transmitted to the Supreme Court of the United States, as per motion and order copied at page 869 of this record.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 11th day of July, A. D. 1913.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

THE UNITED STATES OF AMERICA:

The President of the United States to The Texas Transport and Terminal Company, Compagnie Generale Transatlantique, and Bank de Mulhouse, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a petition and order of appeal sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein J. A. E. Pyle, Trustee in Bankruptcy of Steele, Miller & Company, is Appellant and Texas Transport and Terminal Company, Compagnie Generale Transatlantique and Bank de Mulhouse are Appellees to show cause, if any there be, why the decree rendered against the said J. A. E. Pyle, Trustee in Bankruptcy of Steele, Miller & Company and in said petition and order of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 4th day of July in the year of our Lord one thousand nine hundred and thirteen.

New Orleans, July 9th, 1913.

DON A. PARDEE,
United States Circuit Judge.

Service accepted.

DENEGRE & BLAIR,
Sol'rs for Bank de Mulhouse.
GEO. H. TERRIBERRY,
Solicitor for Texas Tr. & Term. Co. & Compagnie Generale Transatlantique.

[Endorsed:] No. 2389. United States Circuit Court of Appeals, Fifth Circuit. J. A. E. Pyle, Trustee in Bankruptcy of Steele, Miller & Co., Appellant, vs. Texas Transport & Terminal Co., Compagnie Generale Transatlantique, and Bank de Mulhouse, Appellees. Citation. U. S. Circuit Court of Appeals. Filed Jul- 10, 1913. Frank H. Mortimer, Clerk.

Endorsed on cover: File No. 23,807. U. S. Circuit Court Appeals, 5th Circuit. Term No. 226. J. A. E. Pyle, trustee in bankruptcy of Steele, Miller & Company, appellant, vs. The Texas Transport and Terminal Company, Compagnie Generale Transatlantique, and Bank de Mulhouse. Filed August 1st, 1913. File No. 23,807.

SUBJECT INDEX.

AUTHORITIES AND CITATIONS.

Supreme Court of the United States

OCTOBER TERM, 1914.

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller & Company, Appellant, *vs.* THE TEXAS TRANSPORT & TERMINAL COMPANY, COMPAGNIE GENERALE TRANSATLANTIQUE, and BANK DE MULHOUSE.	No. 226.
J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller & Company, Appellant, *vs.* THE TEXAS TRANSPORT & TERMINAL COMPANY, COMPAGNIE GENERALE TRANSATLANTIQUE, and COMPTOIR D'ESCOMPTE DE MULHOUSE.	No. 227.
J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller & Company, Appellant, *vs.* THE TEXAS TRANSPORT & TERMINAL COMPANY, COMPAGNIE GENERALE TRANSATLANTIQUE, and PAUL CHARDIN.	No. 228.

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller & Company, Appellant, *vs.* THE TEXAS TRANSPORT & TERMINAL COMPANY, COMPAGNIE GENERALE TRANSATLANTIQUE, and SOCIETE GENERALE.	No. 229.
J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller & Company, Appellant, *vs.* THE TEXAS TRANSPORT & TERMINAL COMPANY, COMPAGNIE GENERALE TRANSATLANTIQUE, and CREDIT HAVRAIS.	No. 230.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Steele, Miller & Company were cotton merchants in Corinth, Mississippi. Their business was to export cotton to foreign ports. Their entire business, in so far as the record in this case shows, was done upon through bills of lading, the bills covering the entire contract of

carriage from delivery at the initial point up too delivery at the point designated.

Scheuch & Company was a firm of Europeean cotton merchants domiciled at Havre.

Four of the defendants, to-wit, the Societe Generale, the Bank de Mulhouse, the Credit Havrais and tthe Comptoir d'Escompte de Mulhouse were and are bamks domiciled in France, each with a branch in the City of Havre.

Paul Chardin was and is a banker and cottton merchant with a banking house in Paris and a bbranch of his cotton business in Havre, France.

Previous to September 1, 1909, Steele, Millerr & Company had sold or consigned large amounts of cotton to and through Scheuch & Company, and had beeen reimbursed for said cotton in the usual and ordinaryy method, to-wit, the drawing of drafts with all documents attached, which said drafts were accepted by tthe bank designated by Scheuch & Company.

On the 1st of September, 1909, although tthe cotton season of 1908-1909 was at an end, Steele, Millerr & Company owed to the port of Havre some twenty thousand bales of cotton.

Beginning September 1, 1909, Steele, Miller & Company renewed its engagements with Scheuch & Company, who, in turn, arranged credits with certaain banks and bankers, and particularly the defendantts in this case.

The record shows that Steele, Miller & Comnpany arranged to consign large lots of cotton to Scheuch & Company to be held in Havre for sale, and thatt Scheuch & Company made arrangements with the ddefendant

banks and bankers whereby money could be procured on these consignments of cotton in the usual and customary way, to-wit, on drafts secured by all documents, or what is known in the French business world as "engagements d'importation."

In the present case, beginning on or about the 7th day of December, 1909, and continuing through to the 24th day of January, 1910, Steele, Miller & Company forged through bills of lading, and having dated them, drew drafts on the French banks and bankers, who are defendants in this case, and with whom Scheuch & Company had opened bankers' credit. To these drafts Steele, Miller & Company attached the forged through bills of lading. These forged bills of lading were made to resemble genuine bills of lading in every respect. They stated the marks and weight and number of bales of the cotton which they were supposed to represent, and all bore the date of the initial point from which the cotton was presumed to start.

These drafts to which the forged bills of lading were attached were sent to France and accepted by the banks in pursuance to their contract with Scheuch & Company. On being accepted by the banks, and in accordance with the custom of the trade, the documents attached to the drafts, to-wit, the bills of lading, passed into the possession of the banks, which held **them as security for the credit extended Scheuch & Company** by virtue of having loaned their names to the acceptance of the drafts. When these drafts became due, they were paid by the defendant banks. At the time that the banks accepted these drafts, they believed that the bills of lading attached to the drafts were genuine, and that

the cotton described in these bills of lading had been delivered to the railroad company, and that the railroad company had issued its bills of lading therefor. In other words, they accepted the drafts because of their "engagement d'importation" with Scheuch & Company, believing that the bills of lading represented a transaction actually done and completed between Steele, Miller & Company and the railroad company, and that the bills of lading represented security for the actual cotton. To these drafts were attached insurance certificates showing that the cotton represented by the bills of lading had been insured. The banks believed that the cotton had been delivered to and was in the custody of the railroad companies, and that the bills of lading showed that this was a fact, and they further believed that actual cotton in transit had been insured and that the insurance certificates represented this actual fact. They had not the remotest idea at the time that the cotton had not been bought by Steele, Miller & Company, or that same was to be bought at some future date by Steele, Miller & Company and put in the possession of the railroad companies. They had agreed with Scheuch & Company to extend the "engagement d'importation" according to the usual and customary business method in the business world, and they relied upon the statements of the bills of lading that cotton had been delivered to the carriers and they did not expect that it was to be delivered in the future. Quo ad Steele, Miller & Company, the banks had no relations beyond the fact that they accepted the drafts in accordance with their engagements with Scheuch & Company.

Several months after Steele, Miller & Company had thus obtained money on forged bills of lading, they acquired cotton at Philadelphia, Mississippi, and Memphis, Tennessee. This cotton bore the same marks as appeared on the forged bills of lading. They then shipped cotton to Havre, France, via New Orleans, and took out way bills, or, properly speaking, local bills, therefor to their own order. They then sent the cotton by rail to New Orleans and there they surrendered the way bills of lading and exchanged them for port bills of lading. Having done this, they sent the port bills of lading to Scheuch & Company with instructions that they should take these port bills of lading to the several banks and exchange them for the through bills of lading which the banks already held for the cotton having the same marks. Of course, Steele, Miller & Company were aware that they were giving a genuine bill of lading, calling for cotton which they had delivered into the custody of the carrier, in exchange for bills of lading which were absolute forgeries and called for nothing.

Scheuch & Company obeyed the instructions of Steele, Miller & Company, and when they received the genuine bills of lading, took them at once to the bank and delivered them to said banks. In previous cases, the banks surrendered the forged bills in exchange, but on this occasion the banks not only received and kept the genuine bills of lading, but also retained the forged bills of lading which they already had. These genuine bills of lading were delivered to the French banks on various dates from April 26, 1910, to May 7, 1910.

On April 26, 1910, an application was made in the United States Circuit Court for the Northern District of Mississippi to put Steele, Miller & Company into the hands of a receiver, on the ground that the firm was insolvent and was dissipating its assets. An injunction issued.

On May 4, 1910, suit was brought by Knoop, Fabrius & Company in the United States District Court for the Northern District of Mississippi to force Steele, Miller & Company into bankruptcy, and at the time the suit was filed, J. A. E. Pyle was appointed temporary receiver.

On May 31, 1910, Steele, Miller & Company and the individual members thereof were adjudicated bankrupts in the above suit and said Pyle was duly elected trustee and qualified as such.

On August 18, 1910, this bill was filed by the trustee to enjoin the shipment and removal of the cotton called for by the genuine bill of lading from New Orleans to Havre. In substance, the bill avers that the banks became and were mere ordinary, unsecured creditors of Steele, Miller & Company by reason of their payment of the drafts to which the forged bills of lading were attached as security, and that the substitution of the genuine bills of lading in the place of the forged bills of lading at the time and under the conditions was and is an illegal preference over the other ordinary creditors of Steele, Miller & Company.

A restraining order issued, and upon a trial of the rule the Circuit Court granted a preliminary injunction. Subsequently a demurrer was filed by the defendants and

overruled. Thereupon the defendants filed answers, in which they set up the following defenses:

(1) Appropriation.

(2) Estoppel against the trustee.

(3) No preference within the meaning and intendment of the bankruptcy statute.

The lower Court rendered a decree in favor of the defendants, from which the complainant prosecuted an appeal to the Circuit Court of Appeals for the Fifth Circuit. On appeal the decree was affirmed. (See Fed. Rep. 203, p. 1023.) And from the decision of the Circuit Court of Appeals the complainant prosecutes this appeal.

ASSIGNMENTS OF ERROR.

(Tr., p. 856.)

"(1) The United States Circuit Court of Appeals for the Fifth Circuit erred in affirming the decree of the United States District Court for the Eastern District of Louisiana.

"(2) The said United States Circuit Court of Appeals for the Fifth Circuit erred in not reversing the said decree of the United States District Court for the Eastern District of Louisiana.

"(3) The said United States Court of Appeals for the Fifth Circuit erred in failing to sustain appellant's assignment of error No. 4 upon the record of said case, as follows:

" 'That the Court erred in holding by delivering the actual cotton to the carriers, Steele, Miller &

Company intended to appropriate and did appropriate said cotton to the fraudulent bills of lading acquired and held by defendant.'

"(4) The said United States Circuit Court of Appeals for the Fifth Circuit erred in failing to sustain appellant's Assignment of Error No. 5 upon the record of the said case, as follows:

" 'The Court erred in holding that the defendant bank was in fact a purchaser of actual cotton from Steele, Miller & Company.'

"(5) The said United States Circuit Court of Appeals for the Fifth Circuit erred in failing to sustain appellant's Assignment of Error No. 6 upon the record of said case as follows:

" 'The Court erred in failing to find and hold that the defendant knew or ought to have known or had reasonable grounds to believe that Steele, Miller & Company were insolvent at the time the defendant received the genuine bills of lading representing cotton actually shipped referred to in the bill of complaint.'

"(6) The said United States Circuit Court of Appeals for the Fifth Circuit erred in failing to sustain appellant's Assignment of Error No. 7 upon the record of said case as follows:

" 'The Court erred in failing to find and to hold that Steele, Miller & Company, by delivering the genuine bills of lading to the defendant representing cotton actually shipped, thereby intended to prefer and did prefer said defendant to and over its other creditors, and thereby intended to grant and did grant an illegal and unfair preference to the defendant, and that the defendant did receive a preference within the meaning and intendment of the bankrupt statute of the United States.' "

ARGUMENT.

We will argue the above assignments of error under the respective heads of "Appropriation" and "The Doctrine of Unfair Preference," and in connection with the argument on "Appropriation" we will present the argument against the estoppel which the defedants pleaded.

At the very outset let us state the actual position of the trustee. The trustee's contentions are:

1. That there was no sale of cotton.

2. That the transaction was a swindle perpetrated by Steele, Miller & Company on the French banks through Steele, Miller & Company's connection with Scheuen & Company; that Steele, Miller & Company did nothing but obtain the banks' money on false pretenses by securing acceptance, and thereby credit through representation that they had shipped cotton actually delivered at that time, into the custody of the carrier; that the sole reason why the banks accepted the drafts was that they believed the representations implied from the terms of the bill of lading; and that neither Steele, Miller & Company nor the bank had in their minds any idea that the circumstances required, or even admitted, the assumption of an alternative on their part to make good the statements of the bills of lading, if they were not true in point of fact at the time the banks bought them. The trustee, therefore, denies that there was any executory contract existing between Steele, Miller & Company under which Steele, Miller & Company were expected or

authorized to buy cotton for the banks, and, consequently, denies that anything was done by Steele, Miller & Company, in the absence of such an agreement and meeting of minds between them and the banks, can be considered as an "appropriation," whereby the banks could become the owners of the cotton subsequently acquired by Steele, Miller & Company.

3. That when Steele, Miller & Company sent forward for delivery to the banks the genuine bills of lading for cotton actually shipped, they did not "appropriate" this cotton to any executory contract; that, even if there had been a direct contract with the banks, the manner of delivery to the carriers was such as to preclude any suggestion of parting with title at the time of delivery.

4. That the transaction was solely and simply a substitution of genuine and valid bills of lading in place of forged, void and worthless bills of lading.

5. That at the time of the substitution of genuine and valid bills of lading in place of forged and worthless bills of lading, the banks had direct knowledge of the insolvency of Steele, Miller & Company.

6. That at the time of the substitution of the said genuine and valid bills of lading in place of the forged, void and worthless bills of lading, with direct knowledge of the insolvency of Steele, Miller & Company, the defendants knew, or should have known, that a preference was intended, and that, therefore, the same can be avoided as preference under the Bankruptcy Act.

I.

APPROPRIATION.

The discussion of the question of "appropriation" sends us at once to the record to establish the nature of the dealings between Steele, Miller & Company and the defendant banks.

These Facts Are Not Disputed.

1. Linde testifies that, except in the case of Chardin, his dealings were consignments shipped to Scheuch & Company, and that Scheuch & Company arranged for the credit by means of the transactions heretofore discussed.

2. Each and every one of the witnesses for the defendant banks swears that he had no relations direct, or indirect, with Steele, Miller & Company, other than that he extended to Scheuch & Company the "engagement d'importation," by which drafts were accepted against documents which each defendant thought were valid and which each **thought represented cotton actually in the hands of the carrier at the time of the acceptance.**

3. That the bill of lading attached to the drafts were through bills of lading representing that cotton had been delivered at certain initial points for direct shipment.

4. That the cotton involved in this suit was delivered to the carrier upon what is known as "inland bills of lad-

ing" to the order of Steele, Miller & Company, notify Hardin & Company, New Orleans.

5. That these bills of lading were delivered to Steele, Miller & Company, who, in turn forwarded them to J. D. Hardin & Company, forwarding agents.

6. That J. D. Hardin & Company in turn delivered the cotton to the French line and in return therefor received port bills of lading.

7. That these port bills of lading were in turn delivered through the mail to Steele, Miller & Company at Corinth.

8. That Steele, Miller & Company forwarded these bills of lading to Scheuch & Company in Havre by mail.

9. That this kind of transaction had taken place several times before and the port bills of lading had always been forwarded and were at this time forwarded to Scheuch & Company with instructions to substitute them for the fraudulent bills of lading in possession of the banks.

10. That on the previous occasion, the French banks had surrendered the through bills of lading on receipt of these custody bills of lading.

11. That, owing to the conditions in the cotton market at the time that the particular substitutions under discussion were made, the defendant banks, as a matter of precaution, retained both sets of documents.

Necessarily these admitted facts raise two questions:

First. Does the case admit of the application of any theory of "**appropriation?**"

Second. Even if the doctrine of "**appropriation**" is applicable to the relations of the parties shown by the findings, do the facts and acts of the parties show an "**appropriation**" or a **substitution and exchange?**

Discussing these questions in the order stated:

1. Does the case admit of the application of any theory of "**appropriation?**"

First. What is an "appropriation?" Generally it is "the act of setting apart or assigning to a particular use or person; the application to a special use or purpose."

Cyc., Vol. II, p. 565.

In relation to contracts, an "**appropriation**" is the **indication** of the object or property which the parties intend to subject to the operation of that contract, and **the placing of that object** or property in such a situation that it becomes subject to the legal operation of the contract.

This necessarily implies that the contract as made is executory by one of the parties.

When the contract is an executed one, the "**appropriation**" takes place contemporaneously with the contract; the parties indicating at that time the property affected by the contract, and placing it in a position to become subject to the operation of the contract.

It is only in executory contracts that questions of "appropriation" present any difficulty, or give rise to any question, for in these contracts **the thing** to be effected by the contract is not **determined** at the time the contract is entered into; nor placed in a situation to be governed by the contract.

This is done by a later act of one or both parties. When the agreement leaves this matter of "**appropriation**" to the subsequent action of one of the parties to the contract, the questions which will determine the validity of the "**appropriation**" are:

(1) What **authority** was given, either express or implied, by the creditor to the debtor to make an "**appropriation?**"

(2) By what acts has the debtor **manifested an intention** to appropriate.

(3) By what **acts** has he **placed the property** in a position where the contract can operate upon it and govern its legal status?

The French banks, it will be remembered, insist that **there was an executory contract outstanding between them and Steele, Miller & Company,** providing for the sale of the cotton to the French banks. This is the very **foundation** of their claim. If no such contracts were outstanding,—if there were no engagement on the part of Steele, Miller & Company to buy cotton and ship it to the French banks, then the position of these banks becomes untenable and they have no claim to the cotton.

It is perfectly obvious that there was no **express** agreement between Steele, Miller & Company and the banks requiring Steele, Miller & Company to purchase cotton and send it to the banks. On the contrary, the contract **quo ad** the banks was with Scheuch & Company. Then, do the facts shown give rise to an **implied** agreement to the same effect? What were the facts? Drafts upon the French banks were presented for accept-

ance in due course of business, with bills of lading attached. By accepting the drafts the banks came into possession of the drafts, not as owners, but as holders under what the law terms a "**security title.**" The dominion was not complete and no element of final control could be exercised until the maturity of the drafts.

Now, let us assume that the position taken by the banks themselves is the correct one, and that their purpose in accepting the drafts was to **acquire control of the cotton** covered by the bills of lading and that in fact they did have control. They would not have paid one centime of the drafts if they had not believed that the representations of the bills of lading were literally true, and that the control of the cotton was then absolutely and indefeasibly secured to them by the bills of lading, just as the terms of the bills of lading indicated had been done. If, at the time the drafts were presented, Steele, Miller & Company had said to the banks:

> "**The cotton mentioned on those bills of lading is not yet bought by us, nor has it been delivered to the carriers, but if you will pay our drafts, we will buy cotton later and appropriate it to those bills of lading,**"

the banks would certainly have refused to pay the drafts. They would have said:

> "If we desire to advance you money with which to purchase cotton hereafter, we will do that in a direct contract, and will have your engagement to apply to the purchase of cotton the money that we advance you for the purchase of cotton, and we will stipulate when and where the cotton purchased with our money is to be deemed to have

become our property. In so important a matter, involving such a large sum of money, we will not leave anything to inference."

The banks would unquestionably have taken this position if Steele, Miller & Company had applied to borrow money with which to purchase cotton.

On the assumption that the transaction quo ad the banks gave the banks all of the rights of a direct purchaser, the banks parted with their money because they believed that the documents exhibited to them were genuine documents and actually conveyed the cotton which they desired to acquire. In this they were deceived:

Steele, Miller & Company palmed off on them worthless documents which did not in reality call for a single pound of cotton, and those were the documents they bought, and under which they got nothing but an empty dream.

By what possible construction can this swindle perpetrated upon the French banks be construed or tortured into an agreement, on the part of Steele, Miller & Company, that they would thereafter purchase cotton for the banks, equal in amount to the cotton represented on the forged bills of lading? Nothing was further from their thoughts, and nothing was further from the thoughts of the banks than that such an agreement was made or was necessary to be made.

For example: A sells a gold brick. The purchaser buys that brick, believing it to be good. In fact, as he finds out later to his grief, the brick is only gilt. There is not a grain of gold in it. Can the seller be permitted to escape the criminal law by asserting that, when he sold the brick, his real engagement was that, if it was not gold, he would thereafter substitute a gold brick for it; that, really and truly, there was an outstanding executory contract between him and the purchaser under which the latter is entitled to get a genuine brick whenever it can be found and delivered to him by the seller. Such a construction would make it impossible to prosecute swindlers who obtained money under false pretenses. In every case, they would claim that, while their express contract was one of present sale, their implied contract was an executory contract to purchase a thing of equal value to that which they represented they sold.

The purchaser might, and probably would in any case, prefer to send the swindler to jail, and he would indignantly deny that there was any such implied contract. He would ridicule the idea that he had furnished the seller money with which to buy a real gold brick in the future. He would insist that the contract he made was a contract of executed sale operating upon a specific and determined thing, and that the swindle consisted in making him believe that the thing possessed a value which it did not in fact possess, as the seller well knew.

So it is in the present case. Steele, Miller & Company knew that the bills they presented to the banks

were forgeries, and represented nothing of any value. They knew that the banks accepted these bills under the belief that the bills were an evidence of title to property **actually owned** by Steele, Miller & Company and **already placed by them in the custody of the carrier** for transmission to Europe. The banks looked for **no further action** from Steele, Miller & Company. They would have been very much astonished if they had been told by Steele, Miller & Company that the cotton was **yet to be bought** in America and put in the custody of the carrier.

Can an executory contract exist when **neither party** to the contract supposes that any such executory contract is outstanding; or that there is any occasion for an executory contract, when one party represents and the other believes that the contract is an **executed and performed** one? We think that the answer to this question is implied by the question itself.

The banks were in the same position as anyone else, who might buy a thing or lend on a thing which was fraudulently represented to exist, but which did not in fact exist. They have been swindled. The party who swindled them is under a legal obligation to make good the loss that they have sustained through his fraud, but there is no implied agreement on the part of the swindler to take the money which he had obtained by his fraud and with it to purchase a thing of equal value to that which he fraudulently represented to exist. Nor can it be conceived that the person, deluded into buying a non-existent thing, can be considered as giving an **implied authority conferred** to the swindler to buy that thing in the future and appropriate it to the exigencies

of the contract. Common sense tells us that there is no such understanding and no such undertaking by the swindler, and no such authority conferred upon the swindler by the buyer. It is difficult to argue this case, because it is difficult to make it any clearer than the bare statements of fact make it. Once we realize that the banks were simply swindled, that they thought they were buying a thing of value, when in fact they were buying nothing, we will have no difficulty in concluding that Steele, Miller & Company had no right to go out in the market two months later and then buy cotton, and take bills of lading for it, to substitute for the forged bills of lading.

The first contract operates as a forged and worthless bill of lading. The second transaction involved the withdrawal of that forged bill of lading from the operation of the contract and the substitution of a genuine bill of lading in its place with the expectation that the contract would from the moment of substitution, operate on the genuine bill of lading.

We insist, therefore, that in this case no conceivable theory of appropriation can operate, for any theory of appropriation demands as a prerequisite the assumption of an executory contract whereby the vendor undertakes to procure and furnish a certain thing, or a thing of a certain sort, at some date subsequent to the making of the contract, and we think we have shown that, in this case at the time the drafts were paid, there was not the slightest intention on either side of entering into an executory contract. The obligation which the law throws upon a swindler, who obtains money under false pre-

tenses, to make good the loss sustained by the party whom he has swindled, must not be confounded with an executory contract. The executory contract would be the agreement to do the specific thing required to be done by the contract. The obligation to make good the loss does not involve an agreement at all. The law steps in and imposes the obligation, irrespective of the wish or intention of the swindler, and this obligation is not to perform the contract specifically, but to pay the money demanded for loss which the other side has sustained, in consequence of the failure of specific performance.

To impute any implied agreement in this case would be contrary to comon sense and common experience.

(2) But, assuming further, for the sake of argument, that any theory of appropriation is applicable to the relations of the parties as shown by the evidence and the averments of the bill, do the facts and the acts of Steele, Miller & Company show an appropriation actually made, or do they show a substitution of exchange?

The forgeries preceded the purchase of the cotton by Steele, Miller & Company by an interval of from sixty to ninety days; that is, Steele, Miller & Company had obtained acceptance of their drafts, with the forged bills of lading attached thereto, sixty to ninety days before they bought the cotton. The mere purchase of cotton was not an appropriation of that cotton to the French banks, even if an executory contract was outstanding under which an appropriation could be legally made. Neither was the cotton appropriated to the exigencies of the forged bills when it was concentrated at Philadelphia, Mississippi, and Memphis, Tennessee.

When Steele, Miller & Company directed the cotton to be marked with the same marks, which they had made use of on the forged bills of lading, that act did not appropriate the cotton to the forged bills, for Steele, Miller & Company could have exported the cotton to any port in the world with those marks, and the French banks could not have set up a legal claim to it. Neither did Steele, Miller & Company appropriate the cotton to the forged bills of lading when they took out **local bills of lading to their own order**, for all the authorities assert that when the seller, or agent of the purchaser, takes out a bill of lading in his own name, he thereby excludes the transfer of the property covered by that bill of lading to the purchaser. When Steele, Miller & Company came to New Orleans and there took out port bills of lading for the cotton, said bills of lading being **still in their own name**, they did not by that act appropriate the cotton to the forged bills of lading. On the contrary, **they re- asserted their own ownership of the cotton, involving the right to do with it as they saw fit, and after taking out the genuine bills of lading in their own names, Steele, Miller & Company could have sold or indorsed these bills of lading to any cotton merchants in the world.**

What did they do? They wrote letters to Scheuch & Company, enclosing the genuine bills of lading. In these letters, they directed Scheuch & Company to take the genuine bills of lading to the banks and deliver them to the banks, and when they delivered them to get back the forged bills of lading. Scheuch & Company were certainly **pro hac vice** the agents of Steele, Miller & Com-

pany. The latter might have cabled to Scheuch & Company to hold the genuine bills of lading when they arrived and not to deliver them to the banks. It would have been the duty of Scheuch & Company to obey, and we must presume that they would have obeyed these instructions, and then the banks could not have claimed any appropriation of the cotton to the exigencies of the forged bills of lading. Up to the moment then that Scheuch & Company actually delivered the genuine bills of lading, there was not the shadow of an appropriation under which the French banks could claim the genuine bills of lading.

When Scheuch & Company received the letters of Steele, Miller & Company, enclosing the genuine bills of lading, and when they went around to the several banks and handed them the genuine bills of lading, then at the moment of delivery, for the first time, did these banks acquire any claim whatever to the genuine bills of lading, and to the cotton represented thereby, and they acquired that title by reason of the **substitution of the genuine bills of lading** for the **forged** bills of lading.

This substitution was made **at a time** and **in a manner** which indisputably caused it to operate as **an illegal preference** in favor of the French banks over all other creditors.

That there had been no **appropriation**, when the cotton was **bought**, or when it was **marked**, or when it was **shipped** under bills of lading to **Steele, Miller & Company's own order**, or when Steele, Miller & Company **sent these bills to Scheuch & Company**, with instructions what to do with them, results clearly from the **authorities**.

In the case of **St. Joze Indiano, 1st Wheaton, 208,** and quoted at 212, this Court said:

> "But the question still recurs: When is the contract executed? It is certainly competent for an agent abroad who purchases in pursuance of orders to vest the property in his principal immediately on the purchase. This is the case when he purchases exclusively on the credit of his principal, or makes an absolute appropriation and designation of the property for his principal. But where a merchant abroad, in pursuance of orders, either sells his own goods, or purchase goods on his own credit (and thereby in reality becomes the owner), no property in the goods vests in his correspondent, until he has done some **notorious act** (black-letter ours) to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. Until that time he has in contemplation of law the exclusive property, as well as possession, and it is not a wrongful act for him to convert them to any use he pleases. He is at liberty to contract upon any new engagements or make any new conditions in relation to the shipment. • • • It is material, also in this view, that all the papers respecting the shipment were addressed to their own house, or to a house acting as their agents, and the **claimants could have no knowledge or control of the shipment, unless by the consent of the consignees, under future arrangements to be dictated by them.**" (Black letters ours.)

It would seem that this case, in so far as testing the question of title, is absolutely on all-fours with the instant case.

ion, the ownership independently of any particular relation with another person. The **jus ad rem** has for its foundation an obligation incurred by another." (Black-letter ours.)

Again, at page 665, the Court says:

"Generally speaking, in the purchase and shipment of goods, on bills of lading attached to bills of exchange drawn against them, the bill of exchange is drawn on the consignee and purchaser, and sent forward for collection through the banker at the place of shipment, who advances on the draft, and thereafter realizes on it through his correspondents, or by sale as exchange; or the banker at some other point, or at the general exchange center, may be drawee of the bill of exchange instead of the consignee or real owner, the banker standing in the place of his customer, or on the faith of a **running account**, the pledge of other securities, or the customer's personal liability, so that the draft may be charged up at once, and at all events, **the control of the goods is not the sole reliance** of the bankers." (Black-letter ours.)

In connection with the foregoing authority, it is true that the Court was dealing with a prize, and the forfeiture of goods in capture, but the Court differentiates between the claimant against condemnation or capture and the general holder, and the quotation cited is from that portion of the opinion discussing the general law upon the subject.

In this we are borne out by what seems to be elementary law.

> "If, as is frequently the case, the seller has the bill of lading so drawn that the goods are deliverable to **his** order, this, in the absence of evidence of the contrary, is almost decisive in showing his intention to reserve the **jus disponendi** and **to prevent** the passing of title to the buyer. The **prima facie** conclusion that the seller reserves the **jus disponendi**, when the bill of lading is to his order, may be rebutted by proof that in so doing **he acted as agent for the purchaser** and did not intend to retain control of the property. * * * So, when the **seller** ships goods to a **third person** who is agent for delivery to the purchaser, he equally manifests the intention to reserve the **jus disponendi** and **to prevent** the property from passing to the purchaser until such delivery has been made. * * * These rules are not altered by the fact that the **consignor is indebted to the consignee for advances**, even if they may be beyond the value of the consignment." (Black letter ours.)
>
> **Am. & Eng. Enc. of Law, Vol. 124, p. 1066.**

Again, in **St. Jose Indiano, 1st Wheaton, p. 208**, we find the rule laid down in the syllabus as follows:

> "But if he intends to execute the order by his own goods or goods purchased on his own credit, and thus made his own, and consigns them **to his own house**, to be delivered to the principal, when certain conditions are complied with, **the property**

> **is not divested from the agent,** and is at his risk." (Black letters ours.)

Does this case present any of the exceptions, announced in the rule of law above set forth, to warrant the rebuttal of the presumption and to take this case out of the general principle? Is there anything to suggest that Steele, Miller & Company acted as **the agents** of the French banks for the purchase of this cotton? On the contrary, the French banks had no dealings with Steele, Miller & Company, except in so far as they were parties to the **contract d'importation** with Scheuch & Company, and in so far as they were acceptors of the drafts arranged through bankers' credit by Scheuch & Company.

Again, in the **177 U. S., at p. 671,** the Court, in disposing of the title of the property, says:

> "Even if bills of lading are delivered, that circumstance will not be sufficient unless accompanied with an understanding that he who holds the bill of lading is **to bear the risk of the goods as to the voyage,** and as to the market to which they are consigned; otherwise, though the security may avail **pro tanto,** it cannot be held **to work any change in the property.**" (Black letter ours.)

In the instant case, let the Court remember that, at the time of the marking of this cotton, at the time of the delivery to Hardin & Company, at the time of the delivery to the French line, and up to the time of the stoppage of the goods by the United States Circuit Court of

which under the custom of the trade was in the possession of the ship. Accordingly, the Steamship Company would and should have refused to deliver cotton on the through bill of lading, and the parties would have been forced to take steps to procure the cotton. This shows that at no time was the link so complete that delivery to the carrier was delivery for account of the holders of the through bills of lading.

But the French banks have further shown by the testimony of their own managers that at no time was there any appropriation of cotton to their forged bills of lading. Steele, Miller & Company had every reason not to divest itself of the control of the property. Steele, Miller & Company had every reason to insist upon retaining the control of the cotton. Steele, Miller & Company had committed a crime. The evidence of their crime was in existence and they wanted to suppress this evidence. They were willing to deliver cotton, provided the forged bills of lading were in turn delivered. Therefore, instead of intending to appropriate cotton to the through bills of lading, Steele, Miller & Company distincty intended to deliver cotton when the evidence of their crime, or crimes, was in turn surrendered.

In the opinion of the **Lovell case**, appearing at page 757, the Court states the pertinent issue by which these two cases can be differentiated, as follows:

> "In this connection a comparison of the forged and genuine bills of lading will prove instructive.

First. In this case there was no act of Steele, Miller & Company which comes within the category of acts defined by the Supreme Court as "**notorious acts** to divest himself of his title." Certainly the marking of cotton could not be construed as a notorious act divesting the owner of the cotton, because any cotton and all cotton must be marked as cotton, and is bought and sold upon marks. Certainly the act of **shipping the cotton** on local bills of lading to order notify Hardin & Company was not a notorious act, because the cotton went to Hardin & Company with specific instructions by which Steele, Miller & Company **retained possession.** Certainly the transferring of the cotton to the Compagnie Generale, and the taking therefor bills of lading in the name of Steele, Miller & Company was not a **notorious act** by which Steele, Miller & Company divested themselves of the possession, because at the moment that the cotton was delivered, Steele, Miller & Company demanded of and received from the steamship company a bill of lading **to their own order,** showing their **right** to control the shipment.

So, taking all the circumstances together, where in any act of Steele, Miller & Company, do we find a **notorious act** divesting them of possession? On the contrary, we find an open notorious act **maintaining** and **insisting** upon their possession by reason of Steele, Miller & Company taking the bills in **their own name,** and so making the shipment as **to permit them to control it at all times.**

In **Hoover v. Maher, 51 Minn., 53, N. W. Rep., 646,** the Court said:

> "Upon an order for a specified quantity of twine to be shipped to the vendee on a specified day, the separation of the quantity from the vendor's general stock and shipping it before the specified day, is not an appropriation of the quantity separated to the contract, so that the title passes. It is a condition of the vendor's authority to make the appropriation that he shall ship as directed."

It would seem that the authorities above quoted would dispose of the issue of appropriation but for the fact that it has been insisted, and was insisted in the lower Court, that the instant case was controlled entirely by the decision of this Court in **Lovell v. Newman, 192 Fed., 753.**

An examination of the **Lovell case** will disclose that the issue presented there was in no sense the issue presented here.

In the **Lovell case** the parties delivered the goods to the carrier under the identical conditions of the original contract and then suppressed the bills of lading, and from that the Court drew the presumption of an intent to appropriate, without any other resulting or continuing circumstances. In the instant case the cotton was not

shipped in the manner provided by the terms of the original contract, nor were the bills of lading suppressed, eliminating thereby any possible presumption of intent to appropriate; but, as shown, the cotton was shipped in such a manner as to give Steele, Miller & Company, and its co-partner in knowledge of crime, Scheuch & Company, full, absolute and complete control and dominion over the bills of lading and over the cotton, until such time as they saw fit to relinquish this control.

Let us look at the **Lovell case** from the standpoint of what would have happened on the other side had bankruptcy not intervened. The cotton, having been delivered to the carriers upon through bills of lading, would have been turned over by the carrier on arrival at port, to one of the designated steamship lines, and, when the cotton reached the other side, the forged bills of lading would have been presented, and corresponding in marks and form to the actual documents, and in the absence of any knowledge of the forgery, the Steamship Company would have made delivery. Let us take the instant case, supposing bankruptcy had not intervened, and supposing the port bills of lading had not been forwarded to Scheuch & Company for substitution to the French banks, but had been suppressed as in the **Lovell case**. The cotton would have gone forward, and when it reached the other side, the banks would have presented the **forged through bills of lading** and would have demanded the cotton. The steamship manifest would have shown that this cotton **was moving on port bill of lading**, copy of

Appeal, Fifth Circuit, the goods were at all times traveling at the risk of Steele, Miller & Company, and that, even at the time of delivery of the bills of lading to the French banks, no insurance papers were received by them. Supposing the cotton had been lost, could it have been successfully urged against the French banks that by appropriation, Steele, Miller & Company had discharged their obligations, and the risk rested upon the French banks?

Again, at page 667, 177 U. S., the Court says:

> "The principal strength of the argument in favor of the claimant in this case seemed to be rested upon the position that the **consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel**; and hence it was inferred that the captor had no right **to intercept the passage of the property to the consignee.** The doctrine would be well founded, if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the **shipper**, not of **the consignee**, it is competent to the consignor, at any time before **actual delivery** to the consignee, to countermand it, and thus prevent his lien from attaching." (Black-letter ours.)

Again, at page 666:

> "The assignment of bills of lading transfers the **jus ad rem**, but not necessarily the **jus in rem**. The **jus in re** or **in rem** implies the absolute domin-

In both the cotton was to be shipped by the Cotoniera Steamship Line to Genoa. In both the marks of cotton were identical; in both, Gavirati, the broker, was to be notified. In both, the same weights precisely were inserted. **In both the forms used by the railroad company were similar and the genuine bills were signed by the same agent, whose name was used in the forged bills.** (Black letters ours.) It is evident there was a purpose to conform the genuine bills to those that were forged. What were the purposes and intention actuating the bankrupts? They knew that the forged bills had gone forward, and were presumably in the possession of the spinners, since the drafts had been paid and they had received the money. They knew that the genuine bills of lading, so carefully designed to correspond with those that were spurious, would not be necessary to insure the delivery of the cotton to the spinners; and, with this knowledge, their plain purpose was to suppress the genuine bills and permit the cotton to proceed to its destination under the forged bills, and thus prevent exposure of the fraud, with consequent disaster to themselves. In view of these facts, who were the real owners of the cotton?"

What are the facts in the instant case? The bills of lading were as different as night is from day. One bill of lading was a **through bill of lading**, issued at the supposed origin of the shipment, and was good for the complete contract of carriage, while the second bill of lading was a **port bill of lading**, dissimilar in every sense of the term, in no way looking like the original bill of lading; in

no sense bearing any of its marks; in no sense containing all of its terms, and only to be delivered upon the surrender of the fraudulent bill of lading. Can it be maintained for one moment that the mere fact of delivering this cotton to the steamship, with certain marks and weights, which corresponded to certain other marks and weights appearing on other documents, constituted an appropriation of the property?

There was no suppression of these latter bills of lading.

This muniment of title was sent to the French banks in exchange for the documents they had, which is exactly as if Steele, Miller & Company had borrowed from the French bank upon what purported to be a mortgage note, which, in fact, was forged, and then had substituted for that mortgage note an actual mortgage executed within the time prohibited by the statute.

Would it be maintained for a moment that the doctrine of appropriation could apply?

But, says the learned counsel for the banks, the trustee is estopped from setting up such a plea. The trustee takes no greater rights than the bankrupt, and is bound by the acts of the bankrupt.

The answer to that is that the trustee is seeking to set aside an unfair preference under a direct statutory mandate. The mere suggestion of the question would seem to bring its answer. If the trustee is estopped from setting up an unfair preference under conditions of this sort, what character of unfair preference can ever be set aside? There can be no preference without some act of the bankrupt; there can be no act of the bankrupt which he himself can subsequently question. Therefore, if the

doctrine of estoppel applies, the doctrine of the unfair preference goes out of the window for all time.

It would seem that the mere statements of the Court's decision would answer. The doctrine cannot be better said than was stated in the case of **Lovell, Trustee, 192 Fed., 760,** where the Court said:

> "But ordinarily, in the absence of fraud, or a State statute declaring the conveyance void, or unless it contravenes some provision of the bankruptcy acts, a conveyance based upon a valuable consideration, and good as between the parties, will be permitted to stand."

In the **Lovell case** the trustee was not suing under any provision of the bankruptcy statute. In none of the cases quoted by the Court in its opinion at page 761, was a trustee invoking any provisions of the bankruptcy statute. On the contrary, in the **Lovell case,** the trustee was standing before the Court as the owner of the property, claiming to hold the valid bill of lading issued by the railroad company, and in no way seeking to invoke the statute. So much so, that on the motion to affirm or dismiss, the Supreme Court of the United States, recently dismissed the suit, upon the theory that the cause came to the United States Court because of jurisdiction resulting from diverse citizenship.

In the instant case we are invoking a provision of the bankruptcy act. We have sued to set aside a preference as provided and authorized by the statute, and to attempt to quote the doctrine of estoppel, as set forth in

the **Lovell case** and the **Hentz case**, is to deliberately ignore the very words of the Court.

II.

THE DOCTRINE OF THE UNFAIR PREFERENCE.

The trustee contends that the substitution of the port bills of lading for the through bills of lading was an attempt to prefer the defendant banks, and in support of that contention the evidence is as follows:

(a). The trustee has shown that on September 1st, 1909, Steele, Miller & Company owed to the defendant banks and others twenty thousand bales of cotton.

(b). That as early as December, 1909, Steele, Miller & Company forwarded to Scheuch & Company certain port bills of lading which were to be substituted for through bills of lading.

(c). That at that time, and for three months afterwards, and at various times, port bills of lading were substituted for through bills of lading, and that the French bank surrendered the through bills of lading to Scheuch & Company, who, in turn, surrendered them to Steele, Miller & Company.

(d). That the trustee has shown, and no attempt has been made to contradict him, that the existence at the

same time of through bills of lading and port bills of lading for the identical cotton was and is an unheard of event, and one to immediately provoke the thought of the perpetration of a fraud.

(e). That at the time that all of the defendants (except the Societe Generale) received the port bills of lading herein referred to, the defendants had been directly advised by Steele, Miller & Company, through Scheuch & Company of the fact that Steele, Miller & Company had suspended.

(f). That, as will hereafter be discussed in some of the cases, the port bills of lading were substituted for the through bills of lading after a petition for involuntary bankruptcy had been filed.

The defendants, as we understand their position, contend that they knew nothing of the insolvency of Steele, Miller & Company; that they knew nothing of any desire or intent to prefer them, and pitch their case, so far as the preference is concerned, upon their ignorance of the alleged attempts at preference, claiming that in order to constitute a voidable preference it is necessary that the party who receives the preference shall have knowledge of the intention to prefer.

Let us at this point (and we will assume the burden of proof) analyze the proof on the part of the trustee.

1° The trustee has proven that at the time that the French banks received the bills of lading in substitution, Steele, Miller & Company, and the individual members of

said firm, were insolvent, and were insolvent since September, 1909.

2* The trustee has proven that with the exception of the Societe Generale, when the substitution of the bills of lading was made, the banks had been directly advised by **Steele, Miller & Company of their suspension.**

3* The trustee has proven that as to some of the bills of lading, (which will be discussed under a separate head), bankruptcy proceedings had been instituted against Steele, Miller & Company.

4* The trustee has proven that two evidences of title, as represented by two sets of bills of lading for the same property, could not exist and be in circulation at the same time.

5* The trustee has proven the frame of mind of the French banks in that they held and kept the port bills of lading in addition to the through bills of lading as a matter of precaution.

As against this the defendant banks offer the explanation that while it is true that the substitution of bills of lading was and is something unknown to the business world, they were lulled into a sense of security because of the fact that on previous occasions when this had occurred; they had asked Scheuch & Company for an explanation; that Scheuch & Company had advised them that they had inquired of Steele, Miller & Company as to the facts, and that Steele, Miller & Company had advised Scheuch & Company that they had an arrangement with the carrier by which they could secure port bills of lading while the cotton was in transit, and upon

this explanation of Steele, Miller & Company, made through Scheuch & Company, and their denial of any knowledge of any intent to prefer, they ask the Court to decline to apply the doctrine of the unfair preference.

In the argument in the lower Court the learned counsel for the defendants furthermore contended that in order to avoid a preference it was necessary to establish four points:

1° That a preference resulted;

2° That at the time of the preference the parties were insolvent.

3° That the bankrupt intended a preference; and,

4° That the party receiving the preference knew or should have known that a preference was intended.

Assuming, for the purpose of argument, that the position of counsel is correct, we can dismiss three of these propositions with the statement that they are absolutely proven by the record, to-wit:

(a) The record shows insolvency.

(b) The testimony of Linde shows that Steele, Miller & Company intended to furnish Havre with its cotton to the detriment and at the expense of the other creditors.

(c) That at the time of the delivery by which the preference would have been perfected, but for this suit, the defendant banks had asbolute, positive and direct knowledge of the insolvency of Steele, Miller & Company.

This leaves us solely to the question as to whether or not three of the facts claimed by counsel to be necessary

to a preference having been established; the other will not be presumed.

We insist that it is simply necessary to show that at the time of the substitution of these bills of lading the defendant banks were advised of the insolvency of Steele, Miller & Company to establish a presumption jure et de jure that they knew, or should have known, that a preference was intended.

At this time we desire to call the attention of the Court that despite the evidence of the trustee to prove the custom of the trade, the defendants have rested their case solely upon the testimony of their own employees, the managers of their banches in Havre.

Now, what are the facts as shown by the evidence? Let us eliminate at this time the case of the Societe Generale. Its bills of lading were substituted on the 26th, and its case will be the subject of a separate discussion. The other cases were substituted subsequent to the 26th and after Steele, Miller & Company had cabled Scheuch & Company of their suspension, and after Scheuch & Company had formally notified the French banks of this suspension.

In the case of the **Virginia Hardwood Company, 139 Federal, 209,** the Court said:

> "Under **Bankr. Act July 1, 1898,** (and the amendments) defining a preference, and providing that if a bankrupt shall have given a preference, and the person receiving it shall have had reasonable cause to believe that it was so intended, it shall be voidable by the trustee, etc., it is not necessary, in order to entitle the trustee to recover a prefer-

ence, that the preferred creditor should have in fact believed, when he took the preference, that the debtor was insolvent, or that he had reasonable cause so to believe at that time, but it is sufficient that the facts and circumstances with reference to the debtor's financial condition brought home to the creditor were such as would put an ordinarily prudent business man on inquiry, which, if pursued, would lead to knowledge of the debtor's insolvency."

In the case of **Parker v. Black, 143 Federal, 561,** the Court sums up the test of the unfair preference in these words:

"The principle is not controverted that if the defendants, creditors of the bankrupt, had reasonable cause to believe that the bankrupt was insolvent at the time of the payment to them of the pre-existing debt, an unlawful preference was created within the purview of the statute. By Section 60, subd. 'a,' a preference consists of a transfer of property to a creditor by an insolvent before an adjudication in bankruptcy and within four months prior to filing a petition; such creditor having reasonable cause to believe that it was intended to give a preference. **Hence it follows that, if the evidence shows that the debtor was insolvent at the time of the payment of the debt and the defendants knew of his financial condition, the transfer of the money to apply on account of the pre-existing indebtedness was a preference, irrespective of whether the bankrupt intended to give a preference or not. His insolvency at the time of payment is undisputed. The payment of the amount which is sought to be recovered resulted in giving the defendants greater benefit than other creditors**

of the same class have in the distribution of the bankrupts' estate.'' (Black letters ours.)

In the case **''In re Gesas,'' 146 Federal, 734,** the Court said:

> ''All these facts considered were sufficient to put the banks upon its guard and to have at least suggested to it a suspicion of the insolvency of its debtor. But, admitting that the transfer was made in good faith upon the part of the bank, it was without any present consideration whatever, and in that is obnoxious to the law.''

In the case of **Parker v. Black, et als., 143 Federal,** page 560, the Court said:

> ''A payment made by an insolvent to a creditor within four months prior to the debtor's bankruptcy may be recovered by his trustee as a voidable preference, under Bankr. Act, July 1, 1898 (and amendments) if the creditor had reasonable cause to believe a preference was intended, irrespective of the debtor's actual intention; **and such reasonable cause exists if the creditor had knowledge of the insolvency, or of facts which reasonably charge him with such knowledge.''** (Black-letters ours.)

And at page 562 the Court said:

> ''The principle is not controverted that if the defendants, creditors of the bankrupt, had reasonable cause to believe that the bankrupt was insolvent at the time of the payment to them of the pre-existing debts, an unlawful preference was created within the purview of the statute.''

In the case of **Coleman v. Decatur Egg Company, 186 Federal, 136**, the Court said:

> "The bankrupt was hopelessly insolvent. That he intended a preference is inferred as a necessary consequence of his act in giving the mortgage (which in that case constituted the challenged transfer) while in such financial condition. * * *"

In the case **In re Hoghton Web Co., 185 Federal, 213**, the Court said:

> "A transfer of assets by a bankrupt to a creditor within four months prior to bankruptcy, though with intent on the bankrupt's part to prefer the creditor, is not a voidable preference, unless the creditor had reasonable cause to believe that a preference was intended, **or unless the proof shows that creditor knew or ought to have known the substantial truth concerning the bankrupt's financial condition.**" (Black letters ours.)

In the case **In re. Thomas Deuschle & Co., 182 Federal**, at **page 435**, the Court said:

> "Bankrupts being indebted to claimants on notes for lumber which had frequently gone to protest, claimants had accepted another order for lumber, and were about to fill it, when they learned that the bankurpts were in difficulty and did not do so. They were advised on inquiring at a bank where the bankrupts were in difficulties and did not do so. They were also advised, on inquiring at a bank where the bankrupts were in business, that their condition had improved. It was thought that they would pull through. **Held**, that such information was sufficient to put **the claimants on inquiry as to the bankrupt's financial condi-**

tion, and that payments thereafter made and received within four months prior to bankruptcy constituted voidable preference.'' (Black letters ours.)

And the Court said:

> ''Where bankrupt's creditor had placed his claim in the hands of a collection agency, and had threatened suit unless it was paid, involving a possibility of insolvency, the creditor would be presumed to have had knowledge of the debtor's insolvent condition, so as to make payments made within four months of bankruptcy preferences.''

In the case **In re Alexander v. Redmond, 180 Federal, page 96,** the Court said:

> ''Whatever may have been the hopes and expectations of the offices of B. and Company, as to their being able with outside help to weather the storm, we are satisfied that when the transfer was made the agent of Redmond and Company had reasonable right to believe that B. and Company were insolvent, and that the effect of the transfer would be to enable them to obtain a greater percentage of their debt than other creditors of the same class, in the event of the insolvent not being able to secure further capital to enable it to go on and pay all its debts in full. We think such 'belief,' with which, on the proof, Redmond and Company are chargeable must be held to be a 'belief' that it was 'intended' thereby to give a preference.''

In the case of **In re C. J. McDonald and Sons, 178 Federal, at page 487,** the Court said:

> ''A creditor of a bankrupt receiving security under circumstances indicating that his debtor is

insolvent is required to exercise ordinary prudence to ascertain such fact; and, if he fails to investigate, he is chargeable on an issue as to whether such security constitutes a preference with all the knowledge which it is reasonable to suppose he would have acquired if he had made inquiry."

Again, the Court said, quoting from page 492:

"Positive proof of collusion between debtor and creditor, by which one may be preferred, is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth, and the rule of evidence is well settled that circumstances inconclusive if separately considered may by their joint operation, especially when corroborated by moral coincidence, be sufficient signs of insolvency were too many and too marked not to warn the president of this bank that he was getting a prohibited advantage over other creditors. The facts are so persuasive that they would have given reasonable grounds for suspicion to persons far less astute and less accustomed to the ways of business in general than was the president of this bank."

In **Lewis v. Julius, 212 Fed., p. 225,** the Court said:

"Transactions known by a purchaser from a bankrupt to be out of the **usual** and ordinary **course of business** tend to negative good faith in determining whether they are void as in fraud of creditors."

From the foregoing authorities, all of which were decided subsequent to the amendment of 1903, the Court will note the jurisprudence makes two tests in its application of the doctrine of unfair preference, and these are,

1* If the party has reasonable grounds to believe that his debtor is insolvent, then the presumption of a preference instantly arises;

2* If the party has reasonable grounds to believe that a preference is intended, then the presumption of insolvency immediately arises.

In other words, it is unnecessary to prove insolvency and the intention to prefer. It is sufficient to prove that the act complained of was performed; that the party had reasonable grounds to believe that one of the two conditions existed, either insolvency or intent to prefer, and belief and knowledge of one carries with it imputation of belief and knowledge of the other.

In the instant case the evidence is positive that at the time of the substitution of the bills of lading, the defendants actually and positively knew that Steele, Miller & Company had suspended. This information was conveyed to them through Scheuch & Company, to whom Steele, Miller & Company had addressed a cable announcing their suspension. This act of Steele, Miller & Company alone was an act of bankruptcy, in that they admitted in writing, by virtue of this cable to Scheuch & Company their inability to pay their debts.

But, say the French banks—on various occasions, previous to all this, Steele, Miller & Company, through Scheuch & Company had substituted bills of lading, although we knew of the insolvency of Steele, Miller and

Company at the time—we believed the bills of lading were furnished us only in pursuance of the agreement to furnish cotton.

Let us look at the situation for a moment from this point of view. It is true that at various times Steele, Miller & Company did substitute port bills of lading for through bills of lading. On the first occasion, the Societe Generale and the Credit de Mulhouse were astonished at the possibility of this transaction and immediately made inquiry, and were lulled into a sense of security, as they claim, by the statements of Scheuch & Company and the statements of Steele, Miller & Company.

Here is the evidence of the representative of "La Societe Generale," appearing at page 678 of the record.

In considering this evidence, let the Court remember that La Societe Generale is one of the largest, if not the largest bank in France; that its dealings in foreign exchange go into untold millions, and that the French people are in reality the bankers of the world.

Read this testimony and consider that either the Havre branch of La Societe Generale was in the hands of a school-boy in finance or was in the hands of a man who did not hesitate to adapt his views to convenience.

Interrogatory No. 21:

> "Please state whether on any prior occasion or occasions the said bank had received custody of bills of lading purporting to represent the same cotton covered by through bills of lading attached to drafts for the price of the cotton, which had been previously accepted by the bank. If yes, please state on what occasions, and what, if any, explanations were given, and whether the same

were believed by the bank. Please answer this question fully.

"What effect had such previous experience and explanation in causing said bank to suspect or not to suspect fraud or wrong on the part of Steele, Miller & Company when it received said duplicating custody bills of lading covering the said four hundred bales of cotton?"

To the twenty-first interrogatory he saith:

"Before the date 26th of April, we had received out of a total amount of 8,000 bales for that season, covered by through bills, and received against drafts drawn by Steele, Miller & Company three port bills covering 300 bales of cotton, which were already covered by the through bills, and had the same numbers and marks. When Scheuch & Company remitted us these port bills, with support notes attached, they took up the corresponding through bills to return same to Steele, Miller & Company, who had to give them to the railroad company who had issued same."

"These exchanges of through bills took place on the following dates:

"7 December, 1909, 100 bales, 'Mexico' port bill.

"14 February, 1910, 100 bales, 'Virginie' port bill.

"20 April, 1910, 100 bales, 'Honduras' port bill.

"(I join copies of Messrs. Scheuch & Co.'s memos. as Exhibits 34, 35 and 36.)

"On the 7th of December, 1909, I asked Messrs. Scheuch & Company to explain this abnormal fact—namely, the existence of two bills for one and the same shipment of merchandise. This I

did on principle, because it only concerned 100 bales out of a total engagement of 3,100 bales.

"I told Mr. Scheuch the following:

"**Firstly.** This may become dangerous. Suppose, instead of only 100 bales, it concerned larger quantities; and, supposing the exporters are dishonest, they could then draw new drafts, to which they could attach these port bills, on other banks, and in such a way get paid twice for the same shipment.

"**Secondly.** Has this port bill been addressed to you by Steele, Miller & Company free of charge, or have you accepted a direct draft on yourself in exchange for same?

"**Thirdly.** Have you noted anything in the way of working with your good selves which might arouse your suspicions as to the solvency or honesty of Steele, Miller & Company?

"Here are Messrs. Scheuch & Company's answers in numerical order:

"**Firstly.** Your argument is sound, but we believe Steele, Miller & Company incapable of acting dishonestly. In order to obtain a port bill when a through bill is already in existence, they perhaps have to give security to the company, and by giving up that through bill that security may be returned to them.

"**Secondly.** That port bill has arrived free of charge, without us having accepted a draft, and without Steele, Miller & Company having asked anything, except the return of the through bill. Moreover, we would have refused to pay anything against the port bill, which belongs to you.

"**Thirdly.** We have every confidence in the way Messrs. Steele, Miller & Company work, and here is a detail of their punctuality: On the ar-

rival of the cotton we never fail to claim differences in weight and quality, which we sometimes detect. On our simple demand by cable, without even having received our detailed statement by letter, they cover us at once by cable transfers for these differences."

This statement shows that the French bankers considered the conditions abnormal.

The record shows that on the 18th day of April, 1910, the financial world was shocked by the failure of Knight, Yancey & Company, who had been perpetrating the same character of frauds as Steele, Miller & Company. The evidence further shows that by some peculiar condition, while the French banks had been previously surrendering the through bills of lading for the port bills of lading in substitution, they, on this occasion, retained both **as a matter of precaution.** What, then, was the attitude of the French banks at the time that Scheuch & Company substituted for Steele, Miller & Company the bills of lading, after September 29th?

The failure of Knight, Yancey & Company, together with the announcement of the issue of forged bills of lading, had been proclaimed throughout the world. The failure of Steele, Miller & Company had been brought home directly. The banks remembered the fact that Steele, Miller & Company had been "kiting" bills of lading to an extent sufficient to arouse their suspicions and to require an explanation. The banks knew, or should have known, at the time of the Knight, Yancey failure, that their fears and misgivings, which had been quieted by the statements of Steele, Miller & Company,

were correct, and that the acts of Steele, Miller & Company in substituting through bills of lading were so uncommon as to actually suggest and impress the grossest frauds. Therefore, at a time subsequent to the 29th of April, when the direct knowledge was brought home by the cable of Steele, Miller & Company, it was a direct and absolute suggestion to those banks of the fraud which had been perpetrated, and **there must or should have been a reoccurrence to them of the impossible conditions by which the substitution of the bills of lading was accomplished.** And when they sat in their offices subsequent to the 29th of April, with the knowledge of the suspension of Steele, Miller & Company, and received these bills of lading, they knew they were receiving something for nothing, and that this something had been procured outside of the ordinary course of business.

The Time of the Preference and the Relations of Scheuch & Company.

The defendants claim that Steele, Miller & Company made the delivery of these bills of lading at a time unsuspicious; that the actual delivery took place at the time they deposited these bills of lading in the United States mail, addressed to Scheuch & Company, and that no suggestion was made that at that time the banks knew, or had reasonable cause to know, that Steele, Miller & Company was insolvent.

This brings us to a discussion of the relations between Scheuch & Company and Steele, Miller & Company, and between Scheuch & Company and the banks. In other

words, whose agents were Scheuch & Company? This necessitates that we sum up the evidence applicable to the case.

1. The contracts for advances, or the "engagements d'importation," were made by the banks with Scheuch & Company. Scheuch & Company were their customers. They were primarily responsible to them, and Steele, Miller & Company, with their drafts and their bills of lading, were only responsible to the extent that the cotton stood as security for the advances agreed upon with Scheuch & Company and credit extended to Scheuch & Company.

2. The banks had no dealings of any character or nature with Steele, Miller & Company, beyond the acceptance of drafts through their engagements with Scheuch & Company.

3. Scheuch & Company, and the individual members of the firm of Scheuch & Company knew early in March the method adopted by Steele, Miller & Company in using forged bills of lading and substituting through bills of lading. When his conscience was probed, Scheuch admitted the entire transaction, but maintained that he had kept his secret "hoping that Steele, Miller & Company would work out."

4. Whenever through bills of lading were forwarded to Scheuch & Company, they were forwarded instructions and with the general understanding that they would be substituted for the through bills of lading, and the through bills of lading would be returned. On each and every occasion previous to the acts complained of

this was the course followed, and the through bills of lading were returned by the banks through Scheuch & Company.

Therefore, discussing the matter from the standpoint of agency, when Steele, Miller & Company mailed these letters to Scheuch & Company, to whom were they delivering the bills of lading?

It was claimed that the delivery to Scheuch was complete because Scheuch was a party to this contract. If that statement is to prevail, then we say the evidence of knowledge multiplies, because it is in the record that early in March Scheuch was familiar with frauds. Scheuch knew the method; Scheuch & Company were begging and cabling to Steele, Miller & Company to ship cotton to make them good, and when Scheuch & Company received these bills of lading, Scheuch & Company not only knew that Steele, Miller & Company were insolvent, but they knew that Steele, Miller & Company had perpetrated a gigantic fraud in which they were silent partners, and they knew that these bills of lading were coming forward in response to their cables to Steele, Miller & Company begging them to make good, and the fear of Steele, Miller & Company that Scheuch & Company would expose them. So, therefore, in so far as it is contended that delivery to Scheuch & Company was a delivery to one of the parties, who had a right to receive the bills of lading, we suggest that every possible avenue of escape is closed to the defendants.

If these bills of lading were not delivered to Scheuch & Company because of their right to receive them, and because they were parties to the contract, then why were

they delivered to Scheuch & Company? Was Scheuch the agents of the banks? This the banks deny. If they were the agents of the banks, however, were they the agents with full and absolute authority to deal with Steele, Miller & Company on this subject, because, if they were, when the firm received the bills of lading from Steele, Miller & Company it received them impressed with the condition that the forged bills of lading should be returned. No part of the record will suggest that Scheuch & Company had any authority to waive any of the previous conditions of the contract; but, on the contrary, the evidence shows that, when the bills of lading were received, Scheuch & Company promptly delivered them to the banks and the banks carried out the condition of the delivery, to-wit, the return of the through bills of lading.

Were Scheuch & Company, then, the agents of Steele, Miller & Company, and, if so, what was the extent of that agency? The record shows that **quo ad** these bills of lading, Steele, Miller & Company used Scheuch & Company as the intermediary, through whom the substitution and exchange would take place. In other words, Scheuch & Company, as well as Steele, Miller & Company were directly interested in suppressing the evidence of the fraud, and when the bills of lading went to Scheuch & Company they went impressed with the condition and direction that they be delivered in lieu and in place and on return of the evidences of the fraud.

At this time, we call the Court's particular attention to the fact that, by a peculiar circumstance, all of these French banks, the managers of which deny emphatically

and positively that they ever had a conference on this subject, and all of whom testify that on all previous occasions they surrendered the old bills of lading, by some common method of thought, by some method of telepathy, all without consultation, pursued the same course, to-wit, retention of both sets of bills of lading, and all give the same excuse, to-wit, precaution, and they say that at the time they did this, they did it without the slightest idea that Steele, Miller & Company was doing anything outside of the ordinary course of business.

And here, let us examine the record for a moment to show the mental attitude of the French banks and to show what really was passing in their minds.

Linde swears that he was being constantly cabled to for the cotton. The banks denied that they made any inquiries. But what does the record show? The record shows that every statement that Linde made, both in his confession and in his evidence, was true. Scheuch, when his conscience was probed, admitted his participation in the fraud to the extent that Linde mentioned. Scheuch again confirms the statement that Linde was constantly being cabled to in the name of the banks, but he says he did that because he thought it would have greater influence. Riss denies having cabled for this particular cotton, but admits that the Hendren cables, through the Compagnie Generale Transatlantique, were sent by his instructions and at his request, but referred to other cotton. These cables show investigation started April 25th. Therefore, we ask your Honors to read the testimony of Linde, and particularly Linde's letter, appearing on page 185 of the record, examine the admis-

sions that have been wrenched from the defendants, and the Court will find what Linde has said to be true. The banks were in a turmoil, they were worrying and harrassing him for his cotton, and their persistency was such that he feared exposure while in Havre and then confessed to Scheuch.

With all of these facts before the Court, let us again revert to the conditions that existed at the time that the bills of lading were exchanged, and let us analyze each case separately.

Paul Chardin. He purchased cotton under contract, the cotton only to be accepted when it classed up to standard. In other words, according to the testimony of Riss, Chardin's manager, the usual, ordinary and customary methods of sale were not adopted. These usual, ordinary and customary methods were and are, that if an American shipper ships cotton against a contract, and this cotton does not class to the grade of the contract, the purchaser must accept the cotton subject to a deduction by arbitration. In this case, Riss testifies that this contract eliminated the ordinary, customary methods of trade, and required that cotton should be of the grade acceptable to him, and failing to be of such grade, he had the right to refuse it after delivery at Havre. Riss testifies that the correspondenc between the Compagnie Generale Transatlantique and Hendren by way of cable was done on his demand. He testifies further, that he never received any substitution of bills of lading until this particular transaction complained of. His bills of lading were delivered on the 3rd and 7th. When he demanded of the Compagnie Generale that it locate his cot-

ton, he must have had some reason to believe that something was wrong. His reason was that the Knight, Yancey & Company failure had been spread all over the world. It had occurred seven days before—the details of this affair had become general knowledge. He knew when the Hendren reply came that he had been defrauded on some transaction, but, in order to establish his mental attitude at the time of the exchange of bills of lading, it makes no difference what transaction he was inquiring about. He was inquiring and got information about Steele, Miller & Company's methods. He admits that on the 23rd of April information was received concerning Steele, Miller & Company going to protest in Bremen. He admits that he heard of the cables sent by the New Orleans house to the Havre correspondent concerning Steele, Miller & Company. He admits that the **Havre Bulletin** is a journal of general circulation in the cotton trade. He admits that on the 29th of ~~September~~ March he received a direct report from Scheuch & Company concerning the suspension of Steele, Miller & Company. Having admitted so much, the common knowledge of the trade must be imputed to him.

The balance of the cotton world knew that the Steele, Miller & Company failure was identical with the Knight, Yancey & Company failure.

That on the 26th of April, the Circuit Court of the United States ~~for the Fifth Circuit~~ had enjoined Steele, Miller & Company from further operations and had appointed a receiver upon the direct charge of fraud.

That on the 4th of May involuntary bankruptcy proceedings had been instituted and a temporary receiver

appointed by the United States Circuit Court, ~~of Appeal for the Fifth Circuit~~

We have shown the sensitiveness of the cotton market, and have shown how rapidly all details traveled. We have shown the details brought home direct to Mr. Riss. Despite his denial, we have a right to say that he was aware of the other great moves made in this case—to-wit, **the appointment of a receiver by the United States Court and the action in involuntary bankruptcy.**

Therefore, on the 3rd day of May, when Scheuch & Company presented to him a custody bill of lading in lieu and instead of the through bill of lading which he had, he cannot say that he thought it was all right. **He had never made any exchange of bills of lading before. The transactions were new to him.**

When this bill of lading was presented to him, what does the law impute to him? **(1)** That the transaction was absolutely irregular and impossible in the business world; and

(2) That the men seeking to make this substitution were insolvent.

He knew this insolvency arose by reason of the perpetration of one of the most gigantic frauds the century had witnessed. All of its details had been laid bare and the entire cotton world was talking about it. Millions had been lost, and yet he said that he had no reason to suspect that an attempt was being made to prefer him. (Rec., p. 491.)

The **Banque de Mulhouse** had the same information as Riss, except that its manager denied that he caused any cables to be sent. It received its bills of lading be-

tween May 3rd and May 7th. In this connection, let us remember that the Hendren cables (Rec., p. 253), denying the existence of bills of lading, and denouncing the fraud, had reached Havre in reply to the cables sent by the Compagnie Generale at the request of Paul Chardin. The fraud was exposed; it was there. The evidence shows that all the rumors, all the statements, all the cablegrams appertaining to Steele, Miller & Company that went to one bank went to the other defendants. They testified absolutely and positively alike. They testified in the same words on the preliminary hearing. In the cross-interrogatories, the Court will notice where we reproduce a portion of the affidavit of each of the defendants concerning knowledge, and ask them if that statement is correct. On the preliminary hearing they all testified in identical words as to notice, and each one's testimony shows the fragments of each were communicated to everybody. We, therefore, have a right to presume that this particular information, which came into Chardin's possession through the Compagnie Generale, came to the other defendants.

Therefore, on May 3rd and May 7th, after the written notice of Steele, Miller & Company to Scheuch & Company; after the injunction by the Circuit Court of the United States ~~for the Fifth Circuit~~, and the appointment of a receiver; after the publication, and after the world knew all the facts, the Banque de Mulhouse permitted its exchange, and at the moment of the exchange it did not do what it had done ordinarily—return the old bills of lading, but **it held on firmly to both sets of bills of lading as a matter of precaution.**

May we ask the necessity for precaution on that date? Why did they take this precaution when they had no suspicions and the good faith of their customers was not questioned? The mere use of the word "precaution" shows that something was revolving in the mind of the Banque de Mulhouse and that something was the knowledge of the condition of affairs and the determination to hold on to everything so as to come out whole.

The **Comptoir d'Escompte de Mulhouse** received its bills of lading under date of May 7th. Direct knowledge of the suspension of Steele, Miller & Company had been brought to it. Proceedings in involuntary bankruptcy had been filed, a temporary receiver appointed, and the world knew all the facts. These gentlemen also, without any conference with anybody else, violated the previous course of conduct and retained the through bills of lading "as a matter of precaution."

The **Credit Havrais** permitted its substitution on May 7th. The same state of affairs existed, and it also retained its bill of lading "as a matter of precaution."

The **Societe Generale** received its bills of lading on April 26th. It denies knowledge. The testimony of the representative of the Societe Generale is a denial of everything he could deny and an argument in favor of the defendants.

This witness was fencing with the Court. Every word of his testimony suggests insincerity and a desire to evade the truth. He admits having received notice of Steele, Miller & Company having gone to protest in Bremen; he admits that the **Havre Bulletin** published it, but he says that these were mere rumors, and he had no

reason to act on mere rumor. This is the same man who, when the substitution of bills of lading first took place, asked the very questions that we ask. **How is it that Steele, Miller & Company can have two evidences of title to the same cotton at the same time?**

How can business be transacted on this basis?

His testimony shows participation in persistent **kiting** by permitting the interchange of bills of lading. Now, what was his frame of mind on the 26th of April, when he received his bills of lading? He knew that Steele, Miller & Company were in financial difficulty. He knew that the cotton world was turned upside down by the Knight, Yancey & Company failure; he knew that the Knight, Yancey & Company failure resulted from the use of fraudulent bills of lading; he knew his cotton had been delayed beyond any reasonable time; he knew that at the very first attempt at the substitution of bills of lading his suspicions had been aroused to the extent of making written inquiry of Scheuch & Company. He knew that Steele, Miller & Company had been kiting. And all of this knowledge, coupled with the non-delivery of the cotton at that time, caused him to revolve in his mind the absolute and positive fact that this was a plain substitution done for the purpose of delivering to him cotton under conditions by which he would be preferred. Whether the motive was to prevent the French bankers from prosecuting Steele, Miller & Company, whether the motive was to protect Scheuch & Company and thereby protect the banks, he knew he was getting something he was not entitled to in the face of all the facts.

Kiting Is the First Signal of Insolvency—It is the Danger Signal for Fraud.

In the case of the **First National Bank v. Abbott, 165 Federal, 853,** the Court had before it the case of what the Court termed a corporation of the highest grade, dominated by a president, a man of the best reputation, both recommended by reliable bankers of St. Louis. An assignment was made of some open accounts. The officers and agents of the bank testified that they did not believe that the assignment was intended as a preference or that the debtor was insolvent. The Court found that the parties had been kiting by depositing their St. Louis checks in the Philadelphia bank, and drawing same out the same day. **The officers of the bank, men of the highest standing, testified that they knew nothing of** a preference, and were **not advised of insolvency.**

The Court said:

> "Before the bank took the assignment here in controversy, it knew that the **shoe company had persistently been kiting;** that it had failed to maintain its credit deposit; that its local bank in St. Louis refused to pay its checks to the amount of $70,000, and that some of them had laid protested for weeks; that the corporation, after repeated demands by telegraph, by letter and in person, were unable to pay them, and that the Third National Bank in St. Louis, where the shoe company had a line of discount of $200,000, had compelled it to close its account because it insisted upon a perpetual loan."

The transaction was set aside as a preference.

Now, take Mr. Lysell's testimony and consider it in connection with this discussion. Lysell knew that Steele, Miller & Company had been persistently kiting. He did suggest it on the very first occasion, but claims he was lulled into a sense of security by the statement of Scheuch & Company. The testimony of Mr. Janvier, Mr. Fulton, Mr. Breton and Mr. Hendren shows what a reasonable prudent man would and should have thought of the matter. None of these bankers had ever heard of conditions where two sets of bills of lading could be outstanding. (Rec., pp. 116, 121, 245.)

Mr. Hendren says the act spelt fraud.

Therefore, we say that the law imputes to Lysell the knowledge of the fact that kiting was going on—persistent kiting. Whatever may have been his motive in permitting this kiting, is no concern of ours. The fact remains that he permitted substitution of bills of lading some fifteen or twenty times, and we think that that is sufficient to warrant the suggestion of persistent kiting. He knew that the firm had failed to make good on its shipments and that large amounts of cotton were due to Havre. He knew all the facts that the other knew, and he swears that on the occasion of this transaction, which we still refer to as "the kite," he did not permit kiting, but **held the old bills of lading as well as the new ones as a "matter of precaution."** The record shows that some few days before, he permitted a substitution of bills of lading, and that at that time he surrendered the old bills of lading. Why, then, previous to the Knight Yancey

& Company bankruptcy and previous to these statements concerning Steele, Miller & Company's insolvency, did he deliver the old bills of lading and then suddenly take "precautions." He swears he knew nothing. Mr. Lysell has evaded the question. The facts show that there was something revolving in his mind; that he did not treat this transaction as he treated other transactions; that he benefitted by this transaction and was unwilling to surrender to Steele, Miller & Company what he had previously surrendered. He should be judged by the ordinary standards which govern ordinary men, and the law will impute to him kuowledge of the conditions on the date that he permitted the substitution.

Mr. Lysell was given an opportunity to vindicate his business methods, and he was asked if he could ever name a case where there had been substitution of the character mentioned. Mr. Lysell said with a great flourish of trumpets that he could name one case, and he produced two bills of lading from Galveston, Texas, which he says "were sent to him with a letter of guarantee by a bank." Mr. Lysell, with his usual evasion, does not give the name of the party in whose favor the bill of lading was made, so that his evidence cannot be exploded or his facts contested. The mere fact that he received these two bills of lading with a letter of guarantee by an American bank shows that this was a transaction which could and can stand daylight, and that the American bank knew that the mere attempt to deliver both a through and a port bill of lading for the same cotton would probably result in rejection, and therefore accompanied it with bankers' guarantee. Mr. Lysell's whole testimony is full of de-

mals; in fact, too full of denials, and incidentally, we call the Court's attention to the fact that on the preliminary hearing, he also testified as to knowledge in the identical words of the other. The knowledge of one was the knowledge of each.

The defendants claim, however, that, even though the bills of lading were delivered to them at a time when knowledge of insolvency existed, and even after involuntary bankruptcy proceedings had been instituted, the delivery was made in pursuance of a contract entered into more than four months previous and at an unsuspicious time.

In discussing this matter, it must again be called to the attention of the Court that the banks were not the contractors with Steele, Miller & Company, but were simply the holders of the bills of lading as security against acceptance. In so far as the banks were holders of security, their security was worthless—it was forged paper of no value.

It would seem, however, that it is unnecessary to argue this question, as the matter has been absolutely settled by the Circuit Court of Appeals for the Eighth Circuit, in the case of **Great Western Manufacturing Company, 152 Federal, 123.**

In that case the Court, through Judge Sanborn laid down this principle:

> "A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not

deprived of that character or made valid by the fact that it was executed in performance of a contract to do so made more than four months before the filing of the petition."

In the case of **Forbes v. Howe, 3 A. B. R., 475, 102 Mass., 427,** the Court said:

"A mortgage given by an insolvent debtor to secure advances previously made is not purged of its character as an unlawful preference, because it was given in pursuance of an agreement on which the advances have been made; nor because the debtor was induced to give it by the hope of obtaining further credit or means for the continuance of his business; nor because it was intended to make up security which had been reduced by the sale, with the consent of the mortgagee, of property included in a previous mortgage to him, under an understanding that new security should be given."

As a matter of fact, the transaction here complained of was nothing more nor less than substitution of securities at a time when the insolvency of one of the parties was common property. It, therefore, comes within the principle clearly announced by all the text writers and supported by abundant authority.

"A mere exchange of one kind of property or security for another of equal value does not constitute a preference." **Remington on Bankruptcy, page 774.**

"**But if New Securities Exceed Value of Old Preference Arises.** If new securities of greater value are given, and additional securities are

given, the rule that an exchange of securities is not a preference does not apply; or, if the prior securities were of doubtful value, to the extent of the increase of value, the transfer may be preferential." **Remington, p. 774.**

In re Manning, 123 Federal, 180, the Court said:

"There is nothing in the bankrupt law which forbids an excange of securities, and if a person, even while insolvent, makes such exchange as will not diminish the value of his estate, it is unimpeachable; but the Court is bound, when such a transaction is reviewed, to satisfy itself that the securities exchanged are of undoubtedly equal value."

In the case of **Obiter Iron and Supply Co. v .Rolling Mill Co., 125 Fed., 794,** the Court said:

"An exchange of securities within four months of the proceedings in bankruptcy is not a preference within the meaning of the Bankruptcy Act, if the security given up is a valid one when the exchange is made and if it be of equal value with the security substituted for it, or of not greater value."

In re Reese-Hammond Fire Brick Co., Soission v. First Nat. Bank of Pittsburg, 131 Fed., at page 643, the Court said:

"It is too well settled to require discussion that an exchange of securities within the four months is not a fraudulent preference within the meaning of the bankrupt law, even when the creditor and the debtor know that the latter is insolvent, **if the**

> **security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it.''** (Black letters ours.)

And as authority for this statement, the Court quotes **Sawyer v. Turpin, 91 U. S., 114, 120; 23 L. Ed., 235,** and **Stewart v. Platt, 101 U. S., 731, 742; 25 L. Ed., 816.**

The Court will, therefore, see that the test of a transaction of this character is that there can be an exchange of securities, provided, **the securities are of equal value,** and as Judge Sanborn said in the last quoted case, the **security given up is a valid security.**

An examination of Mr. Breton's testimony explains fully what the ''engagement d'importation'' is, and shows that the relation is nothing more nor less than one of acceptance with security. Therefore, as we have insisted throughout these proceedings, the attitude of the defendant banks was simply that of creditors with security. The security was twofold: (1) the personal security of Schenck & Company, and (2) the security of bills of lading held in their possession until their acceptance had been discharged. Therefore, when they surrendered these bills of lading, they surrendered a security upon which they had advanced this money for a security which had come into existence at a subsequent time and which was delivered to them with knowledge of insolvency.

The security given up was an invalid, worthless security.

The security substituted for or added to the security which they had was a valid, binding obligation of the steamship company, which, as stated, had come into existence at a time long after the alleged security which they had given up.

This case narrows itself down to a substitution of a valid security, for an invalid security, or the addition of a valid security to an invalid security for a pre-existing debt, and with full knowledge of insolvency.

In conclusion, the trustee submits that he has proven all of the elements of preference, to-wit:

That at the time of the substitution of the bills of lading, and previous thereto, Steele, Miller & Company, and the individual members thereof, were insolvent.

That the substitution of port bills of lading for through bills of lading, or the addition of the new securities for the old securities, was made at a time when Steele, Miller & Company were insolvent.

That knowledge of the insolvency had been brought directly to the defendants.

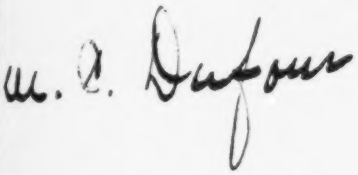
That the circumstances attending the transaction were such as to cause any reasonable man to believe that a preference was intended; that Steele, Miller & Company had forwarded these bills of lading because of persistent demand on the part of Scheuch & Company, made in the name of the banks and the fear and belief of Steele, Miller & Company that they would be exposed.

That there was in reality a substitution or addition to the securities; and that by these acts of Steele, Miller & Company the defendant banks have and will have re-

ceived a greater proportion of their debt than other creditors.

This decree should be reversed, and we so ask.

Respectfully submitted,



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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 226.

J. A. E. PYLE, Trustee in Bankruptcy of Steele, Miller & Company,

Appellant,

vs.

THE TEXAS TRANSPORT & TERMINAL COMPANY, COMPAGNIE GENERALE TRANSATLANTIQUE, and BANK DE MULHOUSE.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR APPELLEES

GEORGE DENÈGRE,
JOSEPH PAXTON BLAIR,
VICTOR LEOVY,
Of Counsel for Appellees.

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Supreme Court of the United States,

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APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR APPELLEES.

I.

General Statement of the Case.

The above-entitled five appeals were tried, argued and decided together both in the District Court and in the Court of Appeals. They present the same general questions of law and of fact. The evidence is the same in each case; that is to say, evidence taken in one case was by stipulation deemed to be taken in all the other cases, and has been included in only one of the transcripts

of record, that of cause No. 226. The cases illustrate and explain each other, so that they may be more conveniently discussed and more readily understood when presented and considered together. We shall, therefore, cover all the cases in this one brief and argument, to be filed in No. 226, and shall file simply a memorandum brief in each of the other four appeals.

The object of each suit is to set aside an alleged voidable transfer of cotton on statutory grounds, namely, that the transferer intended to give a preference and that the transferee, at the time of the transfer, had reasonable ground to believe that a preference was so intended. The complainant in each case, appellant here, is J. A. E. Pyle, trustee of the bankrupt firm of Steele, Miller and Company. Each case has three defendants in common, the Texas Transport and Terminal Company, Compagnie Generale Transatlantique, and Scheuch and Company. These defendants are not now important as parties to the litigation. The two first named have at present a merely nominal interest in the controversy; Scheuch and Company were not served with process and filed no pleadings, and complainant made no attempt to bring them within the jurisdiction of the Court. The main and distinguishing defendant in each case is a French bank or banker, the beneficiary of the alleged preferential transfer. In No. 226 it is the Bank of Mulhouse, in No. 227 the Comptoir d'Escompte de Mulhouse, in No. 228 Paul Chardin, in No. 229 the Societe Generale, and in No. 230 the Credit Havrais. Of these main defendants Paul Chardin is a private banker at Paris and a cotton buyer at Havre, and the other four are engaged in the banking business at Havre.

The transfers of cotton sought to be set aside are those alleged to be involved in shipments of cotton appropriated by Steele, Miller and Company to forged bills of lading which were attached to invoice drafts representing the value of cotton described therein, drawn on the banks and paid for by them. The particular transactions complained of were the last of a long course of similar transactions, all kept from the knowledge of the banks by deceptive and fraudulent devices. The banks were at all times, up to the institution of the proceedings in bankruptcy claiming the cotton, ignorant of the alleged transfers or of any reason therefor, and of the frauds which the shipments in question were intended to conceal. Until informed by the proceedings charging them with knowingly being the beneficiaries of a preference, they did not know that they had been the victims of a fraud. Before it was known that Steele, Miller and Company were in financial difficulties, the cotton in question had been delivered to the ocean carrier at New Orleans and negotiable bills of lading therefor were on their way to Havre. Sometime prior to delivery to the ocean carrier each lot of cotton had been acquired by Steele, Miller and Company, assembled at interior points, and identified by lot numbers, marks and in every other way with the cotton described in the forged bill of lading to which it was intended to be appropriated, and had been started on its way to Havre by delivery to the inland carrier. All this was in fulfilment of the intention which Steele, Miller and Company had when they forwarded the forged bills of lading with invoice drafts attached, and was in accordance with what had become their established course of business, involving many pre-

vious shipments covering thousands of bales of cotton, all, of course, without the knowledge of the banks.

An understanding of the business dealings and relations of Steele, Miller and Company, Scheuch and Company and the French banks, the principal *dramatis personae,* is necessary to an understanding of the questions of law and fact involved in the present suits. In order not to interrupt the narrative, we state now the difference between "port" and "custody" bills of lading. A "port" bill of lading is issued by the steamship company when the vessel named in the bill of lading is already in port. A "custody" bill of lading is issued when the cotton is received before the arrival of the vessel upon which it is to be loaded. The distinction between the two kinds of bills of lading is of no importance in the present litigation. We make the explanation because the two terms are found in the record.

Steele, Miller and Company was a firm of American cotton exporters. Scheuch and Company was a firm of merchant importers of cotton at Havre, who numbered among their American customers the firm of Steele, Miller and Company. Their business with Steele, Miller and Company was handled in two ways. That firm would sell cotton direct to Havre merchants. The drafts therefor would be drawn direct on such merchants or on banks designated by them. In such transactions Scheuch and Company acted simply as selling agents, and were therefore agents only of Steele, Miller and Company. This was the case of Paul Chardin. In the summer of 1909 Steele, Miller and Company arranged to do business with Scheuch and Company for the seasons of 1909-10 on a consignment basis, i. e., to send cotton to Havre to be sold

by Scheuch and Company. This involved that Scheuch and Company should arrange in their own name and on their credit the necessary reimbursement credits with certain banks. It involved that Steele, Miller and Company should draw drafts on the banks designated by Scheuch and Company, with bills of lading attached, for the value of the cotton. In this way the Havre banks were brought in. They agreed with Scheuch and Company to accept invoice drafts against specific cotton with bills of lading annexed, their engagement being limited to so many bales to be drawn against them outstanding at any one time.

Scheuch and Company were known at Havre as merchant importers of cotton. They dealt in spot cotton on their own account. The Havre banks knew and dealt with Scheuch and Company only as merchant importers. They knew nothing of the particular arrangements between Scheuch and Company and Steele, Miller and Company. They knew Steele, Miller and Company only as American exporters of cotton, one of Scheuch and Company's customers, whose documentary drafts they were to accept as long as the outstanding drafts were within the agreed limits. They understood that in this way they were advancing the purchase price for account of Scheuch and Company. Steele, Miller and Company were informed by Scheuch and Company as to their arrangements with the different banks so that they knew upon what banks to draw when making a shipment. When the cotton arrived the bank drawn against itself made the necessary custom house entries, received the cotton from the carrier, warehoused it in its own name, and released it only when the cotton was sold by Scheuch and Com-

pany and the money, to the amount of the draft, was paid over.

If Steele, Miller and Company had acted honestly the banks would have been in possession of the cotton continuously from the time of the acceptance of the draft representing its value to the time of the payment to them of the amount of the draft. By drawing the draft and attaching thereto the bill of lading and the invoice (to which the draft corresponded in amount), the cotton being described by lot numbers and marks in the draft and in the accompanying documents, Steele, Miller and Company thereby transferred to the drawee bank a special property or ownership in the cotton to the amount of the draft and represented that they had simultaneously, through the attached documents, transferred both the title to and possession of the property, conditioned, of course, on the acceptance of the drafts. The bank accepted this transfer in accepting the drafts and thenceforward had a right to consider itself as having the legal title to as well as the possession of the cotton described in the drafts. Its rights, to the amount of the draft, are the same as if it had purchased the cotton.

Steele, Miller and Company did not conduct their business in an honest way. For some time prior to the present litigation they drew and forwarded their drafts either before they had acquired the cotton drawn against or, at any rate, without shipping any cotton at the time. They forged the bills of lading attached to the drafts. But they would always make good their default by subsequently shipping the cotton described in the drafts and the bogus bills. They employed two different methods. Sometimes they would send the cotton forward on

through railroad bills of lading and, suppressing these genuine bills, allow the cotton to be demanded and received on the fraudulent bills, and at times they would ship the cotton to New Orleans, surrender the railroad bills of lading, and send the cotton forward under port or custody bills of lading issued by the steamship company. These custody or port bills of lading would be forwarded to Scheuch and Company for delivery to the banks, with the request to have the original bills of lading returned.

When the first request was made on the banks for a substitution of port or custody bills for the inland bills of lading, misleading and plausible explanations were given as to the apparent duplication of bills of lading; for instance, that they were necessary to prevent delay and facilitate the movement at the port of New Orleans, that an indemnity bond had been given to the Steamship Company, etc. These deceptive statements were intended to allay suspicion and completely accomplished their purpose. The confidence of the banks in the explanation given received ample confirmation from the fact that in repeated instances, as far back as December, 1909, nothing fraudulent or irregular had developed in the case of shipments in which two similar sets of bills of lading had been received. Depositions of Scheuch, pp. 354-6, of Lyzell, p. 588, of Dubois, 678-680, of Linde, p. 203.

In this way the fraudulent practices of Steele, Miller and Company were concealed from the banks. They always firmly believed that the bills of lading attached to the drafts were genuine and represented cotton shipped at the time, and that the custody bills of lading did not represent cotton subsequently acquired or shipped but

represented the same cotton as did the original bills. When, therefore, they accepted the custody bills and complied with the request to return the other bills, they did not know or suspect that the transaction involved a substitution of good bills for bad, of valuable for worthless documents. This went on for some time and thousands of bales of cotton were shipped and received, so that it became the regular course of business for Steele, Miller and Company thus to perform its obligations to the drawees of its drafts.

The cotton involved in these suits are certain lots of cotton which, following the usual course of business of the parties above described, were on their way to Havre. Each lot had been acquired, assembled at an interior point, segregated, identified by lot number and marks with the invoice drafts drawn against them and paid by one or another of the banks, and, after being thus appropriated, had been forwarded to New Orleans, delivered to the ocean carrier, negotiable bills of lading obtained therefor and forwarded to the proper bank, when a sudden and unexpected mischance caused Steele, Miller and Company to suspend payment on April 29, 1910, and to become bankrupt on May 4th. Subsequent investigation disclosed their fraudulent practices. Then the receiver in bankruptcy on May 7, 1910, finding the cotton on board a vessel of the Compagnie Generale Transatlantique, the Steamship Texas, which had not yet sailed, arrested its departure by injunctive order of the Court. These proceedings were followed some time after, namely, on August 18, 1910, by suits of the trustee charging a voidable transfer. The acts relied on as constituting the alleged voidable preference involved no departure from

the usual methods of delivering cotton drawn against. Steele, Miller and Company had drawn the usual invoice drafts against the specific cotton and attached thereto forged bills of lading. The banks had accepted the drafts and received the bills of lading under the belief that the bills of lading were genuine, represented cotton actually shipped at the time, and gave them title to and possession of the cotton. This was the same belief that they had entertained in respect to numerous previous shipments, and under this belief they remained until the news reached them on May 8th of the arrest of the cotton on the "Texas" the day before under the orders of the court below, at the instance of the receiver in bankruptcy of Steele, Miller and Company. After drawing the drafts covering the cotton in suit Steele, Miller and Company proceeded to fulfill their obligations, as they had been accustomed to do, by appropriating cotton to the drafts, shipping it to New Orleans for transportation thence to Havre, and forwarding custody bills of lading therefor to be delivered to the banks. Unforeseen circumstances, however, having forced Steele, Miller and Company, as above stated, to suspend payment on April 29th and to go into involuntary bankruptcy on May 4th, the receiver of the bankruptcy, finding this cotton on board the "Texas" on May 7th, enjoined its removal from the jurisdiction of the lower court. As Steele, Miller and Company had already parted with the title to as well as the possession of the cotton, the present suits were brought on the charge that the transfer of the cotton constituted a voidable transfer.

Disregarding the ocean carrier and its agent the defendants in each suit are Scheuch and Company and a

particular bank. The transfer attacked is that alleged to have resulted from the shipment of the cotton at New Orleans and the forwarding of the custody bills of lading therefor. It is alleged in one part of the bill of complaint that the object and effect of the alleged transfer was to give a preference to the particular defendant bank and in another part that the object and effect was to make a preferential transfer to Scheuch and Company or to the bank or to both of them. It is charged that both Scheuch and Company and the bank knew or ought to have known at the time that a preference was thereby given and intended. In the pleadings and in argument the alleged voidable transfer is described as a substitution or exchange of good bills of lading for bad. But what is meant is the forwarding and delivery of cotton which did not move at the date of the drafts and the bills of lading attached thereto but subsequently.

The allegations in the different suits vary only as to the number and marks of the bales of cotton, the value thereof, the dates of the different shipping documents connected therewith, the dates and amounts of the drafts, the dates when Steele, Miller and Company appropriated the different lots of cotton to their obligation to deliver the same, the dates when the same were started from the different interior points on the way to those who had paid for them and were entitled to receive them, and the dates when they were delivered to the last carrier, the steamship company. Paul Chardin, however, differs from the four Havre banks in this respect, namely, that he was engaged in the mercantile business and the cotton claimed by him was purchased for his use. The following details respecting each case have been either admitted or established by uncontradicted testimony.

The 900 bales of cotton of the Bank of Mulhouse were appropriated, in the manner above described, by Steele, Miller and Company in discharge of their obligation to that bank on or before April 6th, when it is alleged it was ready to begin its journey to Havre via New Orleans. Delivery orders, i. e. orders directing delivery to steamship, covering 300 bales, bear date April 11th, those covering 300 bales more are dated April 13th, and those covering the remaining 300 are dated April 23rd. The dates of the ocean bills of lading are, one April 19th, two April 20th, one April 22nd, five April 25th.

The corresponding dates in respect to the other banks are as follows:

Comptoir d'Escompte de Mulhouse. Date of appropriation on or before April 6th. Date of delivery orders April 13th and of ocean bills of lading April 25th.

Paul Chardin. Date of appropriation on or before April 6th, of delivery orders April 16th and April 18th, and of ocean bills of lading, one April 19th, two April 20th, four April 21st, one April 23rd, and two April 25th.

Societe Generale. Date of appropriation on or before March 23rd, of delivery orders April 13th, and of ocean bills of lading April 15th.

Credit Havrais. Date of appropriation on or before April 6th, date of delivery orders April 15th, and date of ocean bill of lading April 23rd.

By "appropriation" is meant the acts of Steele, Miller & Company set forth in paragraph 7 of the bill of complaint in each case, namely, acquiring and assembling the different lots of cotton, segregating and marking them to correspond with the cotton described in the different forged bills of lading, and starting them on

their journey to Havre in fulfilment of the undertaking created by the forged bills of lading and the attached drafts, etc. Those acts Mr. Linde, a member of the firm of Steele, Miller and Company, produced as a witness by the trustee, declared were done in accordance with the intention which his firm had when they drew the drafts and constituted its customary mode of fulfilling its obligations in the premises. Deposition of Linde, pp. 197-6, 206, 215.

The Court of Appeals, from which these cases come to this Court, was of the opinion that the allegations and proof just referred to established the state of facts which that court had recently decided in *Lovell* v. *Newman,* 192 Fed., 753, and *Hentz & Co.* v. *Lovell, Id.* 762, to constitute an appropriation, operating to transfer the title to the cotton to the banks as holders of the original (forged) bills of lading, who had accepted and paid the invoice drafts attached thereto. If, as we shall contend, this be a correct application of the doctrine of appropriation, it practically disposes of the charge that the bankrupts intended a preference and that the banks knew that a preference was intended. It does this by placing the acts which originated or effected the so-called transfers attacked at a date long prior to the circumstances relied on to create a suspicion of unlawful intention or guilty knowledge.

We undertake to show, however, irrespective of the doctrine of appropriation, that the evidence fails to show the essentials of a voidable transfer.

The object of the suits being to avoid an alleged preferential transfer, it is essential for the trustee to establish that the transfer constituted a preference, that

the property transferred was such as the creditors had a right to subject to their claims, that the transferer intended a preference, and that, at the time of the transfer, the transferee had reasonable cause to believe that the transferer so intended. The defense available to the banks is the failure of the trustee to establish the existence of any one of the foregoing essentials. They specially rely upon the absence of reasonable cause to believe and the absence of intention to prefer.

The defense of the banks which it seems to us must prevail, even if every other defense fails, is that until May 8th, when information of the proceedings taken on May 7th reached them, they were entirely ignorant of the alleged transfer. They did not know that the original bills of lading were forged. They believed them to be genuine and that the cotton called for by them had been shipped at the date of the bills, that they had ever since the acceptance of the drafts been in the secure constructive possession thereof, and therefore that no subsequent transfer of the cotton was necessary or possible. Believing that their bills of lading were genuine, they could not have known of any substitution or exchange of good bills for bad. As a matter of fact, no substitution or exchange of any kind took place. For reasons explained hereafter the banks retained both sets. Now the banks could not have believed that a preference was intended when they were unaware of the transfer which caused the preference. Knowledge of insolvency would not create any belief as to an unknown transfer. With the information and belief which the banks had, they could not reasonably have failed to believe that they were exclusively entitled to the cotton. Several cases are cited later which

hold that ignorance of a transfer which actually constituted a preference and was so intended, is a sufficient defense to a suit to avoid the transfer.

We believe that the defense of want of knowledge of the facts essential to the banks having any belief at all as to the alleged preferential transfer is an insuperable bar to the trustee's recovery. So far as it depends upon facts, it is supported by the uncontradicted testimony of all of defendants' witnesses. It is corroborated throughout by the testimony of Mr. Linde, a member of the bankrupt firm and complainant's main witness. He would certainly know if the banks' plea of ignorance were not true.

The main reliance of the trustee to overcome the defense under discussion is the existence of the two sets of bills of lading. The trustee cannot win unless he succeeds in convincing the Court that the existence of the duplicating bills of lading, under the circumstances, is equivalent to proof of the necessary guilty knowledge on the part of the banks. Under the appropriate heading of this brief, we shall fully discuss this branch of the case. We desire now, as a part of the general statement, to give the Court a synopsis in anticipation of the more extended argument to follow. Before doing so, we call attention to the following:

If, under the doctrine of appropriation, the title or right of the banks to the cotton is to be considered as dating from the time when the cotton was acquired, assembled, marked, etc., then the custody bills of lading cut no figure in the case. The transfer took place prior to and independent of those documents. If, under the doctrine of appropriation, the banks' rights to the cotton

arose when the cotton was actually delivered to the ocean carrier for transportation to Havre, then again it antedates any knowledge by the banks of the existence of two sets of bills of lading and is independent of the custody bills of ladings. The same is true if it be held that Steele, Miller and Company parted with the title to the cotton when the same was delivered to the ocean carrier or when the endorsed bills of lading were deposited in the mail.

We now recur to the question of the belief or knowledge of the banks derivable from the sight of custody bills purporting to represent the same cotton as the bills attached to the drafts. As to what was their actual belief or knowledge, this is a question of fact. The representatives of the banks say they believed the plausible explanations received on a similar occasion in the past, and therefore believed that the custody bills represented the same cotton as the original bills. For the Court to find the opposite of their testimony to be true would be to disregard all the evidence on the subject in order to reach the absurd and improbable conclusion, that the banks made inquiries for the purpose of being deceived and, knowingly and without reason, conducted business for months with a firm of swindlers, accepting drafts representing the value of thousands of bales of cotton with bills of lading known to be bogus attached. The question is whether the explanations given were so transparently false that no sensible man should have been misled thereby. It is a sufficient answer to say that four men of presumably more than usual intelligence, acting independently and when it was to their interest not to be deceived, were in fact deceived. Moreover, one witness, produced by the trustee, and vouched for as an expert

on the subject, Mr. Breton, the only witness to whom the explanations were disclosed, declared he would have acted as did the banks (pp. 131 ffg). Whether the banks were wilfully or purposely blind in ever believing such explanations is to be determined by the conditions existing when the explanations were received and credited. At that time it was to the interest of the banks to know the truth. That their confidence should have continued up to the date of the bills of lading covering the "Texas" cotton is natural; the explanations had been made more plausible and more worthy of belief by repeated arrival and receipt of cotton covered by the so-called duplicating bills of lading without development of any irregularities or suspicion of wrong.

But despite all this it is said that the arrival of the custody bills of lading did affect the bank with guilty knowledge. Here again the contention of the trustee can be sustained only by considering as false all the positive testimony on the subject or by declaring that the managing directors of the greatest banks in the world are men of less than ordinary intelligence. The main, if not the only, ground upon which the trustee asks the Court to so decide and to hold that, despite previous belief strengthened by previous experience, the presentation of the custody bills in the case of the "Texas" was equivalent to all the knowledge necessary for a belief that an unfair preference was intended, is the failure of Knight, Yancey and Company a few days before and the disclosures of their fraudulent practices. Just exactly how long it took for those disclosures to be definitely known, how much the defendant banks knew, and what the fraudulent practices were, is not disclosed by the

record. *It is not shown, however, that they ever employed the device of exchanging custody bills of lading.* It cannot be claimed that the arrival of the custody bills gave the bank any knowledge or notice of any facts. The very most that the trustee can ask the Court to find is that the defendant banks should have suspected some irregularity. And, as evidence that they did suspect something, the trustee calls attention to the failure of the banks in the case of the "Texas" cotton to return the original bills when receiving the custody bills. But this is explained and shown not to be because they knew or suspected that their original bills were worthless, but because they feared that the Compagnie Generale, in view of the Knight-Yancey disclosures, might not be willing to continue to deliver the cotton without the production of the original through railroad bills of lading (pp. 594, 713-715).

The case then reduces itself to this: The banks did not suspect anything as a matter of fact, and very good reasons exist why their suspicions were not aroused. The trustee adduces reasons why he thinks the banks should have been suspicious. We do not think his reasons are sufficient; the most that can be claimed for them is that they should have occasioned a vague suspicion. But the settled law is, that mere grounds of suspicion do not amount to the actual or constructive knowledge required to make out a case of a voidable preference.

In view of the failure of the trustee to prove that the defendant banks ever even constructively knew of the transfer attacked, it is impossible for him to recover. A decision against defendants having as its necessary and sole basis on the most essential part of the case a vague

suspicion, not actual but dependent upon a hardly justifiable imputation, would be unprecedented in the bankruptcy jurisprudence of this country.

The charge of knowledge of insolvency does not affect the defense that the alleged transfer was made without the procurance or knowledge of the banks. The belief of the banks that the original bills of lading were genuine and that the cotton was the cotton drawn against, to which they were exclusively entitled, would not be affected by news received on April 29th of Steele, Miller and Company's financial embarrassment. Nor would knowledge of insolvency create any belief as to an unknown transfer. It requires no authority to support the proposition that knowledge of insolvency is not necessarily the equivalent of knowledge that a preference is being received.

When a person knows that he is receiving a *dation en paiement* or a transfer of assets or a mortgage to discharge or secure an antecedent unsecured indebtedness, his knowledge of the debtor's insolvency would be equivalent to knowledge of intention to prefer, and notice of facts indicating insolvency would be equivalent to actual knowledge. But when a person does not know that he is receiving a *dation en paiement* or a present transfer of assets, but is either ignorant of any transfer or believes that he is receiving what he had title to and was in constructive possession of and was exclusively entitled to prior to the insolvency, then knowledge of insolvency at the time the property came into his actual physical possession cuts no figure. The representatives of the defendant banks have been able, under the peculiar facts of the case, to testify to the fact that knowledge of the

insolvency of Steele, Miller & Company could not have affected the belief of each bank that it was receiving cotton shipped at the dates of the drafts and to which it alone was entitled to (pp. 507, 594, 686-7, 745-6, 803).

Not only has the complainant failed to establish the essential element of guilty knowledge on the part of the banks, but he has failed to establish another equally essential element of his case, namely, intent to prefer on the part of Steele, Miller & Company. One cannot have knowledge of an intended preference when no preference was intended. The absence of any intention on the part of Steele, Miller & Company to give the banks a preference is made evident by the testimony of Linde, considered in its entirety, and is a natural conclusion from the undisputed facts in respect to that firm's mode of doing business and the necessity of forwarding cotton to keep the wheel turning. The ruling motive was the belief that, if the Havre banks could be quieted and induced to loosen up for further reimbursement credits, Steele, Miller & Company could continue their business and eventually pull out. Linde's deposition (pp. 218, 242).

Under a separate heading of this brief we shall refer to the case of *The Idaho,* 93 U. S., 575, as construed and applied by the Circuit Court of Appeals in *Lovell* v. *Newman,* 192 Fed., 753. The principle of appropriation there announced is applicable to the present controversy, the undisputed facts of which make out the strongest sort of case of appropriation. The doctrine of transfer by appropriation is not confined to sales, but extends to any case involving a transfer or delivery of property for the purpose of creating some right *in rem;* but, be

that as it may, it is well settled law that a draft drawn on a bank with bill of lading attached, under the conceded circumstances of this case, operates as a transfer by the drawer to the accepting drawee of a special property in the goods equal to the amount of the draft, and gives the bank the rights of a purchaser, so that its rights are to be worked out as if the case were one of purchase or sale. It goes without saying that the law of appropriation is applicable to a case of alleged voidable transfer, not for the purpose of sustaining a transfer which has the elements of a voidable preference, but for the purpose of determining when the transfer of title took place, so that it may be determined whether at that time the transferee had reasonable cause for belief that he was receiving an intended preference. Under the law of appropriation, as we understand it, the transfer took place, in the case of the Societie Generale, prior to March 23rd, and in the case of the other defendants, prior to April 6th. But, if we are mistaken, then it certainly took place on the delivery of the cotton to the ocean carrier for transportation to Havre for delivery to the defendant banks. This delivery took place in the case of the Societe Generale on April 15th, and in the case of the other banks at various subsequent dates, the latest being April 25th. Now, neither on March 23rd nor on April 6th, nor on April 15th, nor on April 25th, did there exist any grounds whatever for imputing to the banks any sort of guilty knowledge. Hence the doctrine of appropriation is fatal to the trustee's case, not because it can possibly have the effect of justifying a voidable transfer, but because it has the effect of making the transfer take place at a time not suspicious, at a time when it would be hopeless for

the trustee to charge the banks with them having reasonable ground for believing that a preference was being given and received.

We shall devote a special heading in the brief to Paul Chardin and show that, as to the defense of want of reasonable cause for belief, etc., his case is on all fours with the Havre banks, and that as to the defense based on the doctrine of appropriation, his case is at least equally strong as that of the Havre banks, and, according to the views of the trustee's counsel, stronger, because he was an actual purchaser for his own use of the cotton covered by his drafts. The facts peculiar to his case will be discussed in detail.

There is also available to the defendant banks the defense of estoppel, which has been specially pleaded. It will be discussed in its appropriate place in the argument. We do not claim that estoppel applies to the acts of bankruptcy which constitute the alleged voidable preference. But it does apply to the acts which may have misled the creditor as to the nature of his rights or of the situation of the property. It certainly can be urged in respect to acts which precede the alleged voidable transfer and affect the original transaction and the rights and obligations arising therefrom. It may therefore be claimed in this case that the trustee is estopped, as would be the bankrupts, from denying the genuineness of the original bills of lading or from denying that the cotton was shipped at the time the bankrupts misled the banks into believing it was shipped.

As to the evidence, it was stipulated that any evidence taken in any of the cases may be considered as taken and offered in all the other cases. On behalf of defendants

the depositions were taken under commission of the managing director of each bank and of the members of the firm of Scheuch and Company. In the search for evidence of intention to prefer on the part of Steele, Miller and Company or of guilty knowledge on the part of the banks, the witnesses were cross-examined most searchingly and were called upon to produce letters, papers, accounts, etc., to such an extent that the documents produced in response to the calls number over one thousand. As the matter searched for did not exist, naturally no evidence of its existence was found. Most of the documents called for were stipulated out of the record in the district court. The number was further reduced in making up the transcript of appeal for the Court of Appeals, and a great deal of what still survived has been eliminated by exclusion from the printed record.

In our view of the case the only material evidence, besides the drafts, bills of lading, invoices, etc., is the testimony of the managing director of each defendant bank, of F. Scheuch and Albert Schilling, of C. H. G. Linde, a member of the firm of Steele, Miller and Company, and of J. D. Hardin, Jr., who represented the firm at New Orleans. There is surprisingly little conflict or room for conflict over the essential facts of the case. The facts upon which the doctrine of appropriation is invoked by defendants are alleged by complainant in his bill. The dates we rely on in respect to the movement of the cotton are furnished by complainants' witness, J. D. Hardin, Jr. The ignorance of the banks which negative the existence of guilty knowledge is established, without conflict, by the testimony of the banks' representatives, and complainant's witness Linde

confirms the truth of their statements. The absence of any intention on the part of Steele, Miller and Company to give the banks preference is made evident by the testimony of Linde and is a natural conclusion from the established facts in respect to their mode of doing business and the necessity of forwarding cotton to keep the wheel turning.

We do not attach any importance to the testimony of the several local bankers and the steamship agents adduced by the trustee to show that the occurrence of two sets of bills of lading should have excited the suspicion of the Havre banks. The knowledge and experience of the foreign banks was very different from that of the local expert. Whatever force their opinions might otherwise have is destroyed by the fact that, with one exception, they were not placed in the position of the Havre banker by being told of the explanations and occurrences having for their object and effect to allay suspicion. In the exceptional case, when Mr. Breton was informed of the explanations made to the banker, he declared that his belief and conduct would have been the same as that of the defendant banks (pp. 131-133).

We shall not attempt in the discussion of the evidence which next follows to summarize or refer to all the evidence. We shall confine ourselves to the evidence which, in our opinion, establishes the good faith of the banks and the absence of reasonable ground for belief on their part that they were receiving an intended preference.

II.

Discussion of the Evidence Showing Good Faith of the Banks and Absence of Reasonable Cause for Believing that a Preference was Intended or Received.

This branch of appellees' case finds ample support in the depositions of Paul Lysell, managing director of the Bank of Mulhouse, Elisée Paul Dubois, managing director of the Société Generale, Emile Level, managing director of the Comptoir d'Escompte de Mulhouse, Jules Castel, managing director of the Credit Havrais, and Alphonse Riss, representative of Paul Chardin. It will be impossible for the Court to read these depositions without being convinced of the entire good faith of the banks, and of *their complete ignorance of the facts which are relied upon to show that a preference was intended or was actually given.* We direct special attention to the depositions of Mr. Lysell and of Mr. Dubois. We shall quote mainly from the testimony of those witnesses because they cover the facts more fully.

Unless otherwise stated the evidence quoted applies to all five cases. The allegations in the different suits differ only as to the number and marks of the bales of cotton, the dates and amounts of the drafts representing the value thereof, the dates, etc., of the false bills of lading, and the dates when Steele, Miller and Company appropriated the different lots of cotton to their obligation to deliver the same, and the dates, etc., of the bills of lading representing the cotton when it was first started on its way to those who had paid for it and were entitled to receive it and when it was delivered to

the last carrier, the steamship company. Paul Chardin, however, stands on a different footing in this respect, namely, that he was engaged in the mercantile business and the cotton claimed by him was purchased for his use. His case, so far as it is affected by the facts peculiar to it, will be separately discussed.

In answer to the fourth interrogatory Mr. Lysell said that the Bank of Mulhouse opened its branch office at Havre on August 17, 1909.

> "With regard to the credits for reimbursement against documentary drafts, we allow Havre cotton importers to let their American customers draw drafts on the Banque de Mulhouse for the amount of the cotton value, (less freight, insurance, 6% loss in weight), which we accept for the account of our clients against delivery into our possession of a bill of lading which represents the cotton and which is annexed to the draft with other documents, most usually insurance certificates and invoices" (p. 574).

In answer to the same interrogatory Mr. Dubois states that the Société Generale opened its branch at Havre in 1869; that since then a part of its business has consisted in opening of merchandise credits to accommodate Havre merchants; that these credits opened to facilitate importations are strictly against drawings of documentary drafts at 60 or 90 days sight on the Société Generale, which drafts are accepted only when all documents are in order and in the bank's possession. The documents consist of bills of lading, insurance policy, invoices, etc.; "these are attached to the drafts and *confer the full property of said merchandise (cotton, coffee, wool,*

leather, wood, corn, cocoa, etc.), to the Société Generale'' (p. 663).

The bank never makes any uncovered advances on importations; it does not, on principle, accept any draft referring to an importation which is not fully covered by the goods and accompanied by a full set of documents (p. 664).

All of the witnesses testify in high terms of the business integrity, financial responsibility, solvency, good reputation, etc., Scheuch and Company, who were merchants at Havre, engaged among other things in importing cotton.

Interrogatory eight called for a statement of the business arrangements or dealings of each bank with Scheuch and Company. To this interrogatory Mr. Lysell replied:

> "The business arrangements we have had with Scheuch and Company are similar to those which we have had with the other firms on the Havre market. That is to say, we give a credit of reimbursement for a certain number of bales, the same credit being realized by documentary drafts (bills of lading, insurance certificates, and invoices); in consequence the documents (bills of lading, insurance certificates, invoices), were delivered to us against our acceptance of the draft to which they were attached. Besides this, to guarantee ourselves against the fluctuations of the market, we invariably required that those cottons should be covered with a sale of futures in our name registered at the *'Caisse de Liquidation'* du Havre.
>
> "When the goods arrived, we claim them from the consignees of the steamer; we fulfilled ourselves the customhouse formalities, and we stored the goods in our name in the public storehouse authorized by the State, as a security in exchange

of our acceptance of the draft, in order to be able, when due, to pay it, and, in that way, to consent to a prolonged advance by debit in the account current of *Scheuch and Company* of the amount of the paid draft.

"Now supposing that a lot of cotton, (by example 100 bales, part of the goods against which we have accepted documentary drafts) was sold by *Scheuch and Company*, we only gave to that firm an order of delivery of 100 bales, against a money payment of the actual value of the cotton and against a contract of re-purchase of futures at the *'Caisse de Liquidation'* du Havre. In this way there was no necessity for us to know to whom and in which conditions the sale was carried out" (p. 576).

To the same interrogatory, Mr. Dubois replied:

"As I have mentioned (answer 5) we entered into business relations with M.M. Scheuch & Co., in July, 1906, and we opened credits for their importations, the same as we do for other merchants in Havre as I have described in answer 4.

"Against documents (bills of lading, insurance policy, and invoice), for X bales of cotton marked so and so, we accepted drafts on us at sixty or ninety days sight drawn by the American exporters for the full value of the cotton mentioned. Messrs. Scheuch & Co., paid us 5% on the amount of the drafts to cover us against out of pocket expenses such as warehousing, insurance, differences in weight and quality, which might occur.

"On arrival of the steamers we presented ourselves to the steamers' officers or to the agents representing the steamship company as claimants to the cotton and further obtained the permission from the customhouse officers to enter the goods. We then had them warehoused in our name, as a surety

for our acceptances. When Messrs. Scheuch and Co. sold the cotton they paid us over the money and after that we instructed the warehouse to hold the goods at their disposal. This proves that we were not uncovered at any time, because we give our acceptance only in exchange for full title deeds on the property; with these documents we received the cotton when it was unloaded, and had same warehoused in our name and we do not part with the documents until we are paid by Scheuch and Company.

"Further, we were guaranteed against a loss which might occur by a fall in the price of cotton by Messrs. Scheuch and Company, having future sales contracts booked *in our name* at the Clearing House, for an equal amount of bales as had been imported with our assistance. Of course, as our clients did not speculate they always bought back future cotton in our name to the exact amount of cotton which they sold for spot delivery. All big cotton houses have the same way of working; they sell future cotton to the same amount as they have imported, (in this way they minimize their risk against a fall), then when they sell part of the cotton which they hold, directly they cover same by buying the same amount on a future delivery, in this way they guard themselves against a loss on their imported cotton which might occur through a fall in the price.

"Every firm working on other lines would run grave risks and Messrs. Scheuch and Company were always desirous to evade these dangers, they never speculated in any way and we have always been pleased to encourage this way of working" (pp. 666-7).

We ask the Court to read in this connection Mr. Dubois' answer to interrogatory fifth (p. 664).

Interrogatory ninth asked the witnesses to state

whether or not the bank's arrangement with Scheuch and Company provided that drafts drawn should always be accompanied by documents which would give the bank title to the cotton described in the draft, and whether or not the bank would have authorized the drawing of any draft or would have accepted any draft if it had not believed that on acceptance it acquired title to and possession and control of the cotton described in the drafts.

To this Mr. Lysell replied:

"The credit we had opened to Scheuch and Company was a credit of reimbursement, to be realized by documentary drafts to be drawn on us by the American cotton exporters in business relations with Scheuch and Company.

"Therefore the question could never arise for the *Banque de Mulhouse* to accept a draft without any document, and our conviction as European Bankers, is that when you retain in your possession a document appertaining to goods described in the draft you have accepted, you have indisputably sole rights over those goods.

"The *Banque de Mulhouse* has never authorized and still less would have accepted a documentary draft if it had not the firm conviction that the documents which were attached to the draft and which were delivered against its acceptance gave it complete rights over the goods described in the said draft.

"As we have said already, we have always required of the Scheuch and Company firm, in order to protect ourselves against the fluctuations of the market, to deliver into our hands at the same time or before the draft was presented to us, a sale of futures for the same number of bales, registered in

our name at the *Caisse de Liquidation* du Havre. The futures were invariably sold at the Havre Exchange through official brokers and registered in our name at the *Caisse de Liquidation* du Havre. In that way we were absolutely safe from any fluctuation in the market, for we had before us a purchase of available goods and a sale of futures to cover us. The market could go as it liked we were perfectly indifferent, for we were covered against any fluctuation" (p. 577).

To this question Mr. Dubois replied:

"Our arrangements made with Scheuch and Company were that we would not accept American drafts drawn on the Societe Generale for their account, unless they were accompanied by full set of documents treated in Number 8. And generally we took the precaution to demand the two negotiable copies of the bill of lading and of the insurance policy before giving our acceptance. In this way, we were certain that the exporters could not make use of the duplicate documents and fraudulently create new drafts for the same cotton.

"The Societe Generale was absolutely confident that the drafts accepted under these conditions conveyed to them the full property rights on the cotton described in the drafts and in the documents attached to these drafts, and if the Societe Generale had not had this absolute confidence and conviction, namely that by giving their acceptance they obtained the full right, possession and control of the cotton described in these drafts, they would never have authorized the drawing of the drafts, nor would they have accepted them.

"The future sales and purchases were always executed by Scheuch and Company in our name, through brokers, and booked on the registers of the

> Clearing House. In order to prevent a loss through a fall in the price of cotton we made the stipulation that there would always be the same number of bales sold for future delivery as there were bales in the warehouse in our name and sailing for Havre" (pp. 667-8).

The answer to the tenth interrogatory shows that the banks had no interest in, or knowledge of, the contracts or arrangements of Scheuch and Company with any of their customers, and that the banks never extended or intended to extend any credit to the shippers of cotton.

All the witnesses state in answer to the eleventh interrogatory that they knew Steele, Miller and Company only by name as one of the American firms which exported cotton to Havre, that they did not know any of the individual partners, (except that Mr. Lysell had met Linde on one of the latter's visits to Havre) and that neither they nor the banks had ever had anything to do with the firm except to receive the usual notices of drafts, which according to the custom at Havre are never answered.

To the twelfth interrogatory practically the same answers are given. We quote that of Mr. Dubois:

> "Our business arrangement with Scheuch and Company commenced in July, 1906. At this time the firm of Steele, Miller and Company probably did not exist or was not represented by Scheuch and Company.
>
> "Since then, neither Societie Generale nor myself have ever had any knowledge of the contracts or arrangements entered into between Scheuch and Company and Steele, Miller and Company and in which we have no interest at all.

"As I have said in answer No. 10, our arrangements with Scheuch and Company stipulated a commission of ¼ per cent. per acceptance and a further commission of 5 francs monthly per contract for every 50 bales, which was finally reduced to 3 francs.

"The Societe Generale has never opened any credits in favor of Steele, Miller and Company and has never had the intention to do so." (Pages 669, 670.)

The thirteenth interrogatory called for a statement of the first draft drawn on each bank by Steele, Miller and Company under the bank's arrangement with Scheuch and Company, the date of the last draft, and the total number of bales of cotton during the period named thus covered by such drafts.

In the case of the Bank of Mulhouse the date of the first draft was September 13, 1909, of the last draft, February 14, 1910, and the total bales covered by drafts were 25,100 bales. The bank, moreover, accepted on account of the Cotton Commission Company, with the full guarantee of Scheuch and Company, drafts drawn by Steele, Miller and Company against a total of 3,100 bales, during the period from November 15, 1909, to January 17, 1910 (pages 579, 580).

In the case of the Societe Generale the date of the first draft was November 12, 1907, of the last draft February 24, 1910, and the total number of bales drawn against was 8,500 bales, of which 8,000 was for the years 1909-10 (page 670).

It appears from the answer of Mr. Dubois to the same interrogatory (13th) that of the 8,500 bales covered by the drafts of Steele, Miller and Company, 8,000 were for

the season 1909-10, and 500 were for the year 1907. As stated above, the date of the first draft on the Bank of Mulhouse was September 13, 1909. In his answer to direct interrogatory four, Mr. Scheuch says that Steele, Miller and Company began to do business on a consignment basis only during the season of 1909-10, and during that season only he made his arrangements with the Havre banks for reimbursement credits. Prior to that time there were only a few sporadic cases of consigned cotton (page 342).

We call special attention to the statements in the foregoing paragraph because counsel for the trustee based an argument in the court below on the mistaken belief that on September 1, 1909, Steele, Miller and Company owed these banks some 20,000 bales of cotton.

In the case of the Credit Havrais the drafts covered the period from May 10, 1909, to March 7, 1910, and a total of 17,300 bales (page 795).

In the case of the Comptoir d'Escompte de Mulhouse the drafts covered a period from July 28, 1908, to February 18, 1910, and a total of about 25,000 bales (page 735).

It will be seen from the answers to the Fourteenth Interrogatory that the banks regularly paid the accepted drafts of Steele, Miller and Company when due, and that Steele, Miller and Company fulfilled all their obligations in the premises with the following exceptions:

The Bank of Mulhouse is short 1,250 bales, of which 900 bales are involved in the present suit and 350 bales were a part of the 3,100 bales destined to Bremen for account of the Cotton Commission Company, and may be classed as non-existent. The Societe Generale is short

600 bales, 400 involved in this suit and 200 bales of non-existent cotton. The Credit Havrais is short 450 bales, 100 of which is involved in this suit and 350 is the subject of another controversy with the trustee. The Comptoir d'Escompte de Mulhouse is short 1,000 bales in addition to the 100 bales concerned in this suit (pages 580, 670, 736 and 795).

In answer to the sixteenth interrogatory the witnesses show in detail the facts in respect to the particular cotton in suit, the dates and amounts of the drafts, the character of the accompanying documents, which were delivered with the drafts and have ever since remained in the possession of the banks, the subsequent payment of the drafts, etc. The drafts and accompanying documents are annexed as exhibits.

The seventeenth and eighteenth interrogatories sought to elicit the knowledge and belief of the banks as to the genuineness of the bills of lading, etc., and the reliance placed upon the documents accompanying the drafts. The answers of Mr. Dubois for the Societe Generale, quoted below, may be taken, *mutatis mutandis,* as the answers of all.

To the seventeenth interrogatory he saith:

> "On the 21st of February, the date on which we received the documentary drafts, *re* the four hundred bales, for acceptance, the Societe Generale had not the slightest reason to doubt the genuineness of the bills of lading attached to same, which did not differ at all from all other bills formerly received and through which we had already received more than 5,000 bales of cotton shipped by Steele, Miller and Company. We therefore firmly believed when accepting these drafts that the cotton described

therein had been really shipped and was on its way to Havre, and that the possession of the bills of lading assured us of the full property of the cottons (as described and marked) and the incontestable right to receive same on arrival" (page 674).

To the eighteenth interrogatory he saith:

"It is because of this absolute confidence in the security offered by the bills of lading, the belief in the genuineness of the shipment and the validity of the rights which we had acquired through the transference of the bills of lading and their possession that the Societe Generale has accepted those drafts.

"Without that belief and that conviction the Societe Generale would have refused to accept those drafts, and it would have been easy for them to liquidate at once the account of Scheuch and Company if they had had the smallest suspicion about the validness of the bills of lading.

"After having had 5000 bales of cotton, dispatched to us from Steele, Miller and Company, towards the 15th of September, 1909, we only had 900 bales running on the 16th of February, 1910, which were covered by through bills in our possession, against about Fr. 347,000 drawn by Steele, Miller and Company; these cottons were moreover received by us afterwards at the unloading.

"Then after the 16th of February, we have still accepted drafts of Steele, Miller and Company, for account of Scheuch and Company, against 2,000 bales on the following dates:

18th	February	400	Bales	of	Cotton.
21st	"	1,200	"	"	"
24th	"	400	"	"	"

"If the Societe Generale had not had the absolute confidence of which I have spoken before, they

would not only not have accepted the drafts, *re* the 2,000 bales presented from the 18th to the 24th of February, but would have asked Scheuch and Company to retire the 900 bales sailing against payment of about Fr. 347,000, and Scheuch and Company had at that time enough money to pay the amount we would have asked for.

"This fully proves that the Societe Generale had not the slightest suspicion on the validness of the through bills or the actual situation of Steele, Miller and Company" (p. 675).

In answer to the nineteenth interrogatory the witnesses give the dates when the custody bills of lading were delivered into the actual physical possession of the banks, the custody bills and the note accompanying the delivery thereof being annexed as exhibits. Custody bills representing the 400 bales of the Societe Generale reached that bank April 26th. Those representing 700 bales to the Chardin cotton reached the owner May 3rd. Those representing 300 bales of the cotton of the Bank of Mulhouse were delivered on May 3rd. The remaining custody bills came in to the actual physical possession of those for whom they were intended on May 7th.

Interrogatory twenty covers the crux of the matter when it calls for the knowledge and belief of the banks at the time as to the object and effect of the custody bills. The witnesses state most positively that they firmly believed that the original bills of lading were genuine and represented cotton shipped at the time; that the custody bills of lading represented the same cotton and not cotton subsequently acquired to discharge or make good any default of Steele, Miller and Company.

We copy the answers of Mr. Lysell and Mr. Dubois:

"At the time that the bank received the said custody bills of lading, neither I nor the bank knew that the said bills of lading attached to the drafts were not genuine, and that they were false or had been forged. Neither I nor the bank knew or believed at that time that the said custody bills of lading represented cotton acquired and shipped by *Steele, Miller and Company,* subsequently to the drawing and sending of the said drafts and the said bills of lading accompanying them. The *Banque de Mulhouse* and I believed that the said custody bills represented the same cotton as the through bills attached to the drafts we had already in our possession. Neither I nor the bank knew or was informed at any time prior to the receipt of said custody bills of lading that the custody bills existed and that Steele, Miller and Company intended to procure them and forward them to the bank.

"At the date on which the *Banque de Mulhouse* received the said custody bills of lading neither I nor the bank had any knowledge or information that at some time subsequent to the date of said drafts and the bills of lading which accompanied them, Messrs. Steele, Miller and Company had acquired and put together nine hundred bales of cotton, had caused the same to be marked and numbered to correspond with the numbers and marks described in the said drafts, and had caused the same to be shipped to New Orleans and thence by a steamer of the *Compagnie Generale Transatlantique* to Havre, the same cotton so shipped being represented by the said custody bills of lading" (p. 587).

Mr. Dubois' answer is as follows:

"When we received those custody bills of lading the Societe Generale and myself had no idea that the

through bills attached to the drafts were forged or falsified.

"The Societe Generale and myself had no knowledge that those custody bills of lading represented cotton bought and shipped by Steele, Miller and Company after the issue and posting of the said drafts and through bills, and we thought that the custody bills represented the same cotton as mentioned by those through bills attached to the drafts.

"Before receipt of the custody bills of lading (26th of April) the bank and myself had no knowledge of the creation of same. We never knew that Steele, Miller and Company had intentions to create said custody bills and send them to the bank.

"At the time we received those custody bills neither the bank nor myself had any knowledge that some time after the issue of the drafts and the through bills attached to same, Steele, Miller and Company had bought and put together 400 bales of cotton, which they had marked and numbered so as to correspond with the numbers and marks mentioned in the said drafts and had them sent to New Orleans and from there by a steamship of the Compagnie Generale Transatlantique to Havre, this cotton being represented in the said custody bills.

"The bank and myself only know the alleged facts from the proceedings taken by the trustee for Steele, Miller and Company's failure, and it is impossible for us to verify same" (pp. 677-8).

The answers to the twenty-first interrogatory refer to the receipt of custody bills on previous occasions, the plausible explanations given in respect thereto and the reasons justifying the banks in believing the explanations and in suspecting no fraud or improper practices. Their confidence in the explanations had received am-

ple confirmation from the fact that in repeated instances, as far back as December 9, 1909, nothing fraudulent or irregular had developed in the case of shipments in which two similar sets of bills of lading were received. The foreign banks were naturally not as familiar with the rules and practices of rail and ocean carriers in this country as some local bankers seem to be after the disclosure of the frauds of Knight, Yancey and Company. We shall have occasion hereafter to quote from the testimony on this branch of the case (pp. 588, 678).

In answer to an inquiry in the twenty-second interrogatory as to when the banks learned for the first time that the bills of lading attached to the drafts covering the cotton were forged or claimed to be forged and bogus, the witnesses state the date to be May 8, 1910, when they were informed by Scheuch and Company of the injunction suit in the United States District Court at New Orleans.

In answer to an inquiry in the same interrogatory as to when the banks learned for the first time that the custody bills of lading did not cover, or were claimed not to cover, cotton shipped at the dates of the original bills of lading attached to the drafts, but covered, or were claimed to cover, cotton subsequently acquired and shipped by Steele, Miller and Company, the witnesses declare that such information came to them for the first time on May 8, 1910, through the institution of the above referred to suit. We quote the answer of Mr. Lysell:

> "The bank and myself learned in that way for the first time by the news of that suit, that it was alleged or pretended that the railroad bills of lading attached to the drafts accepted by the *Banque de*

Mulhouse were considered as forged or bogus. The *Banque de Mulhouse* and myself have also learned for the first time in that way that the 900 bales of cotton of which it had paid the total amount when it paid the drafts appertaining to them, could have not been shipped on the dates on which it was believed that they were shipped, that is to say, on the 27th December, 1909, 20th, 21st and 25th January, 1910, shown on the through bills of lading and that the nine custody bills of lading covered or were supposed to cover cotton acquired and shipped subsequently by *Steele, Miller and Company*" (p. 590).

Interrogatory twenty-three calls upon the witnesses to answer the charge that the banks knew or ought to have known at the time of the delivery of the cotton in question to the ocean carrier or at the time of the mailing of the custody bills of lading, or at the time of the latters' arrival that Steele, Miller and Company intended thereby to give the banks a preference. That this charge was very fully met and refuted is shown by the answers. We quote those of Mr. Lysell and Mr. Dubois:

"The *Banque de Mulhouse* had never known, nor suspected, at any date of the following periods that Messrs. *Steele, Miller and Company* had intended thereby to prefer the *Banque de Mulhouse* to their other creditors. That was true, not only at the time when Messrs. *Steele, Miller and Company* delivered to the *Compagnie Generale Transatlantique* the cotton covered by the custody bills; that delivery has moreover been done by *Steele, Miller and Company* without the knowledge of the *Banque de Mulhouse.* But it was also true at the time when Messrs. *Steele, Miller and Company* sent, also without the knowledge of the *Banque de Mulhouse,* the said custody bills to Havre.

"It was always true at the dates of the 3rd and 7th of May, 1910, when the said custody bills of lading were delivered into the material and physical possession of the *Banque de Mulhouse.* The *Banque de Mulhouse* has never indeed known nor suspected, nor has it even had occasion to know or suspect, that Messrs. *Steele, Miller and Company* intended to give preference to it, by these bills of lading, to the prejudice of its creditors, as the matter refers to custody bills appertaining to the same number of bales with the same marks and numbers as the through bills of lading detained by the bank and that Messrs. *Steele, Miller and Company* for several months had delivered to the bank, over and over again, custody bills corresponding in the like manner as to numbers and marks of bales with the through bills attached to the documentary drafts that it had accepted. *The Banque de Mulhouse* has not considered even at the dates of the 3rd and 7th of May, 1910 (the only period of the three periods at which it knew the financial situation of Messrs. *Steele, Miller and Company*), that it was possible it could be a competition of other creditors of Messrs. *Steele, Miller and Company* for those same goods which it considered as its property since its acceptances" (pp. 590-1).

Mr. Dubois says:

"The delivery of those 400 bales to the Compagnie Generale Transatlantique, which were covered by the said custody bills, and the mailing of those custody bills to Havre was done by Steele, Miller and Company, on their initiative, unknown to the Societe Generale; for that reason the Societe Generale knew nothing and could have no knowledge of the fact that Steele, Miller and Company, by doing likewise, thereby marked their intention to favor us to the detriment of the other creditors.

"Moreover, as the Societe Generale has always considered that they obtained the full right on the cotton described in the drafts and through bills attached after having accepted those drafts, the fact that on the 26th of April they received custody bills covering the same cotton, could really not have made them suppose that they received a preference in that way to the detriment of other creditors, who they did not even know existed" (p. 683).

In answer to the twenty-fourth interrogatory the witnesses declare that when the banks received the custody bills of lading that they did not know or believe that they were thereby receiving an interest or right in or over the cotton purporting to be covered thereby in addition to what they believed they had already had in virtue of their acceptance of the drafts and as holders of the through bills attached thereto; that the banks did not see in the delivery of the custody bills of lading anything more than the consequence of the acceptance of the documentary drafts.

We quote the answer of Mr. Dubois as follows:

"When receiving the said custody bills on the 26th of April, the Societe Generale did not know or believe that they received in that way any interest or any more right to the cotton which those bills were said to cover, than they already firmly believed they possessed as acceptors of the said four drafts and as possessors of the said through bills attached to same.

"Before the 26th of April, we thought, and this was strengthened through our experience during that season, that we would continue to receive our cotton, at the unloading, by presenting through bills, possibly accompanied by agent's or master's receipts

which were remitted to us by Scheuch and Company when they received same from the exporters. Experience has taught us that those agent's or master's receipts were not strictly necessary, as up to the 26th of April, out of the 5700 bales obtained by us through presenting *our through bills,* 2000 bales had been obtained by us from the Compagnie Generale Transatlantique from four steamers *without the slightest difficulty,* although we had no agent's or master's receipt corresponding with the through bills for those 2000 bales.

"On the 26th of April when we received custody bills instead and in place of agent's or master's receipts we thought that the cotton represented by same was the same as that covered by the through bills and that on the 15th of April, Steele, Miller and Company had not been able to obtain those custody bills, without giving security, as they had done previously, in conformity with their declarations treated in answer No. 21 and in which we sincerely believed" (pp. 683-4).

Interrogatory twenty-five calls for the knowledge of the banks in respect to the financial condition of Steele, Miller and Company. The answer of one witness will do for all. Mr. Dubois says:

"The Societe Generale had full confidence in the solvency of Steele, Miller and Company when they accepted the aforesaid drafts on the 21st of February; this they proved by accepting the drafts for 2000 bales of cotton between the 18th and 24th of February, 1910, (see answer No. 18).

"Far from knowing the bad situation Messrs. Steele, Miller and Company were in, the Societe Generale believed the situation to be good.

"On the 15th of April, the date of the custody

bills, nothing had come to our knowledge which might have diminished the confidence which the Societe Generale had in the solvency of Steele, Miller and Company's financial situation.

"On Tuesday, the 26th of April, when the Societe Generale received the four custody bills dated 15th of April, early in the afternoon, they had no knowledge of the insolvency of Steele, Miller and Company; of this they were informed on the 29th of April by Messrs. Scheuch and Company.

"Before that date the Societe Generale had only known the following:

"On the 21st of April, in the morning, we heard that Knight, Yancey and Company had stopped payments; this news we heard, was known the day before in Liverpool; at that time there was no rumors concerning Steele, Miller and Company.

"On Saturday evening, April the 23rd, Scheuch and Company told us that they had received a wire from Bremen informing them that a bank in said town had refused to accept drafts drawn by Steele, Miller and Company, and alleging to have that [done] same out of principle. We thought that the said bank acted likewise by way of precaution because of the unfavorable impressions made by the discovery of the frauds committed by Knight, Yancey and Company; we had not the slightest idea that Steele, Miller and Company could have committed similar acts, and we did not doubt that they would promptly settle their business with the Bremen bank by taking the necessary steps which we thought their financial position was capable of doing.

"In the evening of the 26th of April, some hours after we had received our custody bills (3 or 4 hours), dated the 15th of April, we were informed that a firm in Havre had received a cable from New Orleans stating the failure of Steele, Miller and Company.

"We communicated this to Scheuch and Company, who told us that they were very much surprised at that, as they had not heard of it from Steele, Miller and Company, and they ought to have been informed in the very first place.

"In the morning of the 27th of April that same Havre firm found a second cable from their correspondents in New Orleans asking them to keep the news contained in their first cable strictly private, as the failure had not been confirmed.

"The 27th and 28th of April we were still under the impression of this quasi denial, we still believed that Steele, Miller and Company were in momentary difficulties which could be settled and which had been caused by the refusal of Bremen to accept their drafts; because we still did not know the actual situation they were in.

"At last, on the 29th of April, Messrs. Scheuch and Company informed us that they had just received a cable from Messrs. Steele, Miller and Company telling them that they had been obliged to stop payments.

"From that date and up to the 7th of May inclusive we had not received any other information *re* the actual situation of Steele, Miller and Company; during the whole of that period the Societe Generale and myself had never had any information referring to the amount of the assets and the engagements of Steele, Miller and Company, neither did we have any details which enabled us to make a comparison between the value of their assets and their liabilities" (pp. 684-6).

By interrogatory twenty-six the witnesses were asked what effect, if any, knowledge of the insolvency of Steele, Miller and Company, if it had been possessed by the banks either on the date of the forwarding of the cus-

tody bills of lading or on the date of their arrival at Havre, would have had upon the belief of the banks that they each were receiving only cotton to which it alone was entitled. To this the witnesses make the obviously truthful answer that such knowledge would have had no effect because they would still have been under the belief that the custody bills represented the cotton which had been shipped at the dates of the draft, cotton which they had paid for had long been in constructive possession of, and in which no other creditor had any rights (pp. 594, 686).

Questioned in interrogatory twenty-eighth as to the notice appearing in the "Bulletin de Correspondence," published at Havre, April 27th, 1910, the matter is sufficiently covered by the answer of Mr. Dubois, which we quote:

> "I have already mentioned (answer No. 25) the receipt of the cable received in the evening of the 26th of April by a firm in Havre and of the arrival of one in the morning of the 27th, informing them that the failure of Steele, Miller and Company had not been confirmed. I must have read the 'Bulletin de Correspondence' in the morning of the 28th of April; it appeared late in the evening of the 27th. I believe that I can remember having spoken about it to Messrs. Scheuch and Company, and that they said that they did not believe that the news was correct because they would certainly have been informed directly.
>
> "The news arrived at Scheuch and Company in the morning of the 29th of April, at a time when I could have obtained some information from the 'Bulletin de Correspondence' of the evening before.
>
> "In Havre, as well as in foreign towns, exagger-

ated rumors get about in troubled times which are sometimes incorrect; these the papers get hold of and publish same without verifying them. During that period the failure of two American cotton houses was reported to me, and those same houses are still in existence. I could not do otherwise than address myself to Scheuch and Company for information.

"The two articles evidently refer to Steele, Miller and Company, but they do not throw any light onto their financial position. 'It is to be hoped that the rumors afloat are exaggerated, and *one does not make any illusion to frauds committed.*' One talks about the non-delivery of bought cotton, which would only convey to us that European merchants had bought cotton from Steele, Miller and Company at a time when the price was lower, and that, since a rise had taken place, Messrs. Steele, Miller and Company were not delivering that cotton, which would result in a loss to the buyers" (pp. 688-9).

All of the witnesses declare that they had never read or heard of the notice or item appearing in the Liverpool paper referred to in interrogatory twenty-nine.

The interrogatories not specifically referred to do not directly bear upon the branch of the case now under discussion, absence of guilty knowledge on the part of the banks.

If the testimony of the defendant banks stood in need of support, it would find confirmation in the testimony of Mr. Linde. That witness declares that the banks were completely ignorant of the fraudulent practices of Steele, Miller & Company and were innocent victims, and that the purpose of subsequently appropriating cotton to the

forged bills of lading was simply to keep the wheel turning and was in pursuance of the methods which Steele, Miller & Company had for a long time followed and in execution of an intention formed when the drafts were originally drawn. His testimony presents the reverse side of the picture. When the court reads it, no argument will be necessary to show how unfounded is the theory that there was any collusion or understanding between Steele, Miller & Company and the different defendant banks or banker, or any intention on the one side to give a preference or any guilty knowledge on the other. The intention which resulted in the transfer and delivery complained of was not formed on the eve of expected insolvency or for the purpose of defeating the bankrupt law or to prefer any particular creditor or set of creditors. It existed from the moment the drafts were drawn against the banks, when the sky was all serene, and it was completely consummated, so far as it depended on any action of Steele, Miller & Company, before the storm broke upon them. All the lots of cotton in suit had been set aside and appropriated, started on their way to Havre, the inland bills of lading therefor surrendered and delivery orders to the ocean carrier issued, all before even the Knight Yancey failure.

The dates of the custody bills of lading covering the cotton in question, each bill of lading representing 100 bales, are as follows:

The four concerning the cotton of the Societe Generale are all dated April 15th. The one covering the 199 bales of the Credit Havrais is dated April 23rd, and the one covering the 100 bales of the Comptoir d'Escompte de Mulhouse was dated April 25th. Of the nine repre-

senting the cotton of the Bank of Mulhouse, one was dated April 19th, two April 20th, one April 22nd, and five April 25th. Of the ten representing the cotton of Paul Chardin, one bore date April 19th, two April 20th, four April 21st, one April 23rd, and two April 25th.

The dates of inland railroad bills of lading under which the above cotton was brought to this port and the dates when Mr. Hardin, agent of Steele, Miller and Company, acting under previously given instructions, issued the delivery orders under which the cotton was delivered to the ocean carrier, are as follows (testimony of Hardin, pp. 149-153):

> The bills of lading under which the cotton of the Societe Generale moved were dated, three February 3rd, and one February 1st. Date of delivery order was April 13th. The inland bill of lading covering the cotton of the Credit Havrais was dated April 6th, and the delivery April 15th, and the bill of lading for the cotton of the Comptoir d'Escompte de Mulhouse was dated April 5th and the delivery order April 13th. Mr. Hardin was unable to state the dates of the inland bills of lading covering the Chardin cotton or the cotton of the Bank of Mulhouse, but under the allegations of the bill of complaint, the cotton was ready for shipment not later than April 6th. Delivery orders covering 300 bales of the Bank of Mulhouse cotton bore date April 11th, those covering 300 more bales were dated April 13th, and those covering the remaining 300 bales were dated April 23rd. As to the Chardin cotton delivery orders for 400 bales were dated April 16th, and for the balance April 18th.
>
> The inland bills of lading in respect to the cotton of the Societe Generale were through bills of lading, bearing the same dates, places of shipment,

etc., as the forged bills of lading. The manner of effecting delivery, forwarding, etc., of the "Texas" cotton was in accordance with the methods of business which Steele, Miller and Company had been pursuing all that season.

It will be seen from the foregoing that in respect to all the "Texas" cotton, the inland railroad bills of lading had been surrendered and the delivery orders under which the cotton reached the possession of the ocean carrier had been sent out on or prior to April 18th, with the exception of 300 bales, the delivery order for which was dated April 23rd.

There was no association whatever between the four Havre banks on one side and Paul Chardin on the other. Their business was different, their relations to Steele, Miller and Company entirely independent, and there was no reason for co-operation between them on April 26th. The banks had no knowledge of or concern with Paul Chardin's troubles. To maintain that they knew of or were effected by any communication between Chardin and the Compagnie Generale can find no support in this record. We take issue with any statement to the contrary and appeal to the record. The four banks and Chardin stood apart and remained apart, until they were brought together by the arrest of their cotton in the same suit on May 7th.

In regard to the record of a suit on April 26th, 1910, in Mississippi against Steele, Miller and Company, it is sufficient to say that defendants cannot be affected by a proceeding of which it is not shown that they or any one else except the parties thereto had any knowledge.

III.

Requisites of a Suit to Avoid a Preferential Transfer and the Defenses Thereto.

The events giving rise to this litigation occurred prior to the amendment to the Bankruptcy Act in 1910. It is governed by the provisions of section 60b as amended in 1903 (32 Stat., 799). The frequent citation which will be made in this brief of decisions of the lower federal courts is explained by the fact that questions of the character involved in this controversy are so often finally decided in those courts that decisions of this court directly in point and rendered under the present Bankruptcy Act are not always available.

The law is now well settled that, in order to set aside or recover a preference under the provisions of section 60b of the Bankruptcy Act, it must be established by competent evidence that the bankrupt was insolvent at the time he made the payment, that *he intended thereby to give a preference*, and that the creditor receiving it or benefited thereby had reasonable cause at the time to believe that it was intended thereby to give a preference.

The words in italics are perhaps the only part of the above statement which will be objected to by appellant. In the general statement of the case we called attention to the fact that there was no intention, actual or presumed, on the part of Steele, Miller and Company to prefer any of the defendant banks. We now submit that the reasonable implication of the statute is that the debtor himself must have intended a preference. The lower federal courts have accordingly frequently held that there must have been an actual intention on the

part of the debtor to give a preference, and that such an intention cannot be presumed from the fact alone that he knew himself to be insolvent or from the fact alone that a preference was given. No one can reasonably be charged with reasonable cause to believe something unless the something existed to which the belief is supposed to relate. Guilty intention on the part of the transferer is just as essential as guilty knowledge on the part of the transferee. Like any other fact the intention may be established by circumstantial evidence, by just and necessary inferences from proven facts; but it must be shown to exist. It is not a presumption of law arising from proof of payment or transfer at a time of known insolvency.

Hardy v. *Gray* (C. C. A. First Circuit), 144 Fed., 922; *Clarke* v. *Rogers* (C. C. A., Same Circuit), 183 Fed., p. 526; *Tumlin* v. *Bryan* (C. C. A. Fifth Circuit), 165 Fed., p. 168; *In re First National Bank of Louisville* (C. C. A., Sixth Circuit), 155 Fed., pp. 103-4; *Rutland County Nat. Bank* v. *Graves*, 156 Fed., p. 170; *In re M'Loon*, 162 Fed., p. 578; *Debus* v. *Yates*, 193 Fed., p. 435, ffg.; *In re Freeman Cotting Coat Co.*, 212 Fed., 548, 551.

The conclusions reached in the above cited cases are supported by the decisions of this court in *Wilson* v. *City Bank*, 17 Wall., p. 486; *Grant* v. *National Bank*, 97 U. S., p. 81, and *Barbour* v. *Priest*, 103 U. S., p. 296.

We have pointed out in the general statement of the case that to show guilty knowledge on the part of the banks the trustee relies upon the existence of circumstances which he claims ought to have led the banks to suspect something and upon alleged knowledge of Steele, Miller and Company's insolvency.

It is hardly necessary to cite authorities in support of the proposition that reasonable cause to believe that a preference was intended cannot be held to be proved by circumstances that would merely excite suspicion, especially when the evidence shows that every effort was made by the bankrupts to allay suspicion and that such efforts were successful. *Tumlin* v. *Bryan* (C. C. A.), 165 Fed., p. 169, citing *Grant* v. *National Bank,* 97 U. S., 80, and *Stucky* v. *Masonic Savings Bank,* 108 U. S., 74.

As to the insolvency of Steele, Miller and Company, we have already shown that it was not known until after the transfers complained of had taken place, and that if it had been sooner known, it could not reasonably have been expected to create any belief of an intended preference. A belief that a debtor was insolvent does not necessarily create reasonable cause for belief that he intended a preference. *In re First National Bank of Louisville* (C. C. A.), 155 Fed., p. 104; *Tumlin* v. *Bryan* (C. C. A.), 165 Fed., 168.

The burden of proof is, of course, on the trustee to establish the facts necessary to make out a case of voidable transfer.

Our defense is that there was never any intention on the part of Steele, Miller and Company to prefer the banks and that at no time prior to the transfers complained of did the banks have reasonable cause to believe that they were receiving a preference. Their first knowledge of the transfers attacked was on May 8th, 1910, the day after the beginning of the proceedings to set them aside. It is therefore not necessary to determine the exact date when the transfers took place. If this Court approves, as we believe it will, the application

made by the Court of Appeals to this case of the doctrine of appropriation, it will find that the title to the cotton passed when the cotton was acquired, assembled, marked, etc. (that is, on March 23rd and April 6th), or, if not at that time, then certainly when the appropriation was completely consummated and carried into effect by the delivery of the various lots of cotton, with their identifying marks, to the ocean carrier at New Orleans, which took place on various dates from April 15th to April 25th. It will not be even claimed that either on March 23rd or April 6th or April 15th or April 25th there existed any reasonable ground for belief on the part of the banks that a preference was being given or received. Their title to or rights in the cotton would then arise prior to the existence of the custody bills of lading, and prior to any alleged ground for suspicion of fraud or alleged knowledge of insolvency. We shall accordingly discuss, under the next heading, the doctrine of appropriation and its application to this litigation. We shall afterwards endeavor to show that, irrespective of the doctrine of appropriation, the bankrupts parted with the title to and possession of the property, and completely lost all their *jus disponendi,* when they delivered the cotton to the ocean carrier or certainly when they mailed the bills of lading therefor, and that again the trustee's case falls, because the transfer would again antedate the alleged grounds for reasonable cause to believe a preference was being given.

IV.

The Defense Based on the Doctrine of Appropriation. Its Application to Suits to Set Aside Voidable Transfers, and its Effect in the Present Suit.

In the general statement of the case and in stating the defenses relied upon we explained the part the law of appropriation can play in this case. We, of course, do not contend that a transfer taking place by operation of the law of appropriation may not be as readily set aside as any other transfer, *provided* it be shown to have the elements of a preferential transfer. But it is true of a transfer by appropriation as of any other transfer that the reasonable ground for belief must exist at the time of the transfer. If the doctrine of appropriation is applied to this case, then the transfer took place, not on the arrival of the custody bills at Havre, but when the appropriation took place, and the appropriation took place, in the case of the Societe Generale, prior to March 23rd, and in the case of other banks prior to April 6th, at which dates the different lots of cotton had been acquired, assembled, marked and appropriated to the obligations of Steele, Miller and Company to transfer such cotton to the respective banks. Even if the Court should hold that the appropriation did not take effect until the cotton was brought to New Orleans and delivered to the ocean carrier, this would locate the transfer in the case of the Societe Generale on April 15th and in the case of the other banks on various dates, none later than April 25.

The fatal effect on the trustee's case of the recogni-

tion of defendant's rights under the law of appropriation is obvious. For the alleged transfer, the coming into existence of the defendant banks' title to or right in the cotton, does not date from the arrival of the custody bills of lading in Havre but long prior thereto, and when it would be hopeless for the trustee to claim that any reasonable ground existed for belief by the banks that a preference was being given.

We do not deem it necessary to discuss at length the general doctrine of appropriation or its applicability to a case of forged bills of lading attached to drafts and the subsequent acquisition of property to meet the obligations arising from the drafts and the forged documents. We rely upon *The Idaho,* 93 U. S., 575, 581-583, and upon the reasoning of the Circuit Court of Appeals in *Lovell* v. *Newman,* 192 Fed., 753, 758-761. The cases at bar are stronger than the *Newman case* because the evidence of title, the genuine bills of lading, had been forwarded and had left the possession of Steele, Miller and Company before they had even suspended payment, and, of course, before any claim was made to the cotton by the receiver or trustee. It does not affect the principles of law involved or their applicability that in the case of Knight Yancey the fraud was worked by suppressing the genuine bills of lading and allowing delivery to be obtained through the bogus bills, while Steele, Miller and Company concealed their fraud by the device of forwarding the genuine bills of lading, and, by plausible and deceptive statements, exchanging them for the bogus documents.

That the decision of the Court of Appeals in the *Newman case* is in accord with well established principles

of the law of sales regarding the passage of title on shipment by carrier will be seen from the following authorities:

Benjamin in his work on Sales says (p. 343):

> "The property is transferred the moment the dispatch or other act has commenced, for there an appropriation is made finally and conclusively by the authority conferred in the agreement, and in Lord Coke's language: 'The certainty, and thereby the property begins by election.'"

At page 350 Benjamin states it to be:

> "Settled law, that where a seller delivers goods to a carrier by order of the purchaser, the appropriation is determined; the delivery to the carrier is a delivery to the buyer and the property vests immediately.
>
> "And in the United States the law is established to the same effect."

See:

> 24 Am. & Eng. Ency. of Law, 2 ed., pp. 1059, 1071.

In *Williston on Sales,* pp. 398-400, the law is stated as follows:

> "By far the commonest and most important illustration of the transfer of property in goods by subsequent appropriation by the seller arises where the seller, in fulfillment of a contract with, or an offer from the buyer, delivers goods to a carrier for shipment to the buyer. That the property passes on delivery to the carrier, under these circumstances, was settled indeed before the general rules as to appropriation by the seller had been completely

> formulated. * * * Whatever reasons may be given for the rule, it is well settled both in England and in this country."

In *United States* v. *Andrews,* 207 U. S., 240, this Court said:

> "That where a purchaser of goods directs their delivery for his account to a designated carrier, the latter becomes the agent of the purchaser, and delivery to such carrier is a legal delivery to the purchaser is also beyond question."

If it be contended that the Court of Appeals erred in applying its conclusions in the *Newman case* to the present cases, because the claimants of the cotton in the *Newman case* were actual purchasers, while in the present cases the bankers hold only security title or were purchasers for security, we answer as follows:

1.—In the case of *Hentz & Company* vs. *Lovell,* 192 Fed., 762, the doctrine of appropriation was applied to holders of bills of lading for security. The facts of that case are fully stated in the opinion of the District Court, reported in 181 Fed., 555. By reference to the last cited decision it will be found that the cotton awarded to Hentz & Company was cotton on which they had made a loan or advance through acceptance and payment of a draft drawn with the forged bills of lading attached.

2.—A still more conclusive answer is that in The Idaho, Porter and Company were not purchasers, but advancers of money on the faith of the bill of lading.

3.—No reason can be assigned why the principle of appropriation should not operate in favor of those hav-

ing rights *in rem* arising from other contracts than those of purchase and sale. It applies under the Civil Law to mortgages (Civil Code of Louisiana, Art. 3304) and to pledges (Civil Code 3144, and *Herber* v. *Thompson,* 47 La. An., p. 809). There is no material difference, so far as the doctrine of appropriation is concerned, between a contract to transfer the legal title and a special property and a contract to transfer the legal title and the entire property.

4.—*The rights of a bank which has accepted a draft and received therewith a negotiable bill of lading representing the goods for the value of which the draft is drawn, are similar to those of a purchaser and are to be worked out on the same principles as would be applicable to purchasers for use.*

Our contention is, not that the banks actually purchased the cotton in question for their use, but that their right, title or interest in the cotton, until they were repaid the amount of the drafts, were those of a purchaser; that they had a special property or ownership in the goods equal to the amount of the drafts and if the drafts represented the value of the goods, their special property or ownership therein was complete; that the banks were not to be regarded as mortgagees or pledgees, but as persons to whom a special property or ownership had been transferred, *i. e.,* as vendees. The overwhelming weight of authority, as we shall presently show, supports our contention.

Before discussing the authorities we wish to say that the case of the banks does not depend upon the Court's regarding them as purchaser of the cotton. The banks

certainly have a right *in rem* to secure their advances. In the answer of each defendant appears this paragraph:

> 10.—"It avers that it has fully set forth the facts constituting the transactions between it and Steele, Miller and Company, and that it has a right to ask this Honorable Court, as it now does, to define, recognize and enforce its rights in, to or in respect to, said cotton; that whether it has the full and complete title thereto, as it is advised and so claims, or whether it has a qualified ownership or special property therein, or an equitable lien or charge or a right in the nature of a pledge, its rights or title to said cotton were not created by any voidable or preferential transfer, are superior to any rights or title of complainant, and entitle it to be awarded said cotton or its proceeds and to a dissolution of the restraining and injunctive orders heretofore issued in this cause, as well as in said cause No. 14219."

Our contention is well supported by the following cases:

In *Dows* v. *National Exchange Bank*, 91 U. S., 618, the syllabus is to this effect:

> "A party discounting a draft and receiving therewith, deliverable to his order, a bill of lading of the goods against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft. Where such party forwarded the draft, with the bill of lading thereto attached, to an agent, with instructions, by special endorsement on the bill and by letter to hold the wheat in a bill mentioned against which the draft had been drawn, until payment of the draft should

be made, the agent had no power, prior to such payment, to make a delivery which would divest the ownership of his principal."

And in the opinion it is said of a bank which had discounted drafts drawn against the property, and to which the bills of lading were delivered with the drafts as security that it became the owner of the property and had a complete right to maintain ownership until payment.

The case of *Dows* v. *National Exchange Bank* was cited with approval in the case of *Means* v. *Bank of Randall,* 146 U. S., 627, where the Court declared that when the bill of lading is transferred and delivered as collateral security, *i. e.,* to a bank advancing the price, the rights of the transferee of the bill of lading were *"The same as those of an actual purchaser,* so far as the exercise of those rights was necessary to protect the holder."

Citing the two above cases, it was declared in *Merchants Exchange Bank* v. *McGraw,* 76 Fed. Rep., pp. 930-33, dealing with the case of a bank which had accepted a draft with invoice and bill of lading attached:

> "There are numerous authorities which, in substance, declare that the delivery by an owner of goods of a common carrier's receipt for them as security for an advance of money with the intention to transfer the property in the goods, is a symbolical delivery of them, and vests in the person making the advance a special property in the goods sufficient to enable him to maintain replevin or trover, or other action at law against another who attaches them upon a writ against the general owner."

In the case of *In re E. Reboulin Fils and Company,* 165 Fed., page 245, the bankrupts had engagements d'importation with Munroe and Company, bankers in Paris with a branch or agency in this country. In virtue thereof the bankrupts, importers of cherries, drew drafts on Munroe and Company with invoices and bills of lading attached. The bills of lading were giving up to the bankrupts under a trust receipt and they thus secured possession of a certain shipment of cherries before Munroe and Company had been reimbursed for the draft drawn against the same. In this condition of things the bankruptcy occurred. Held, that the acceptor of the draft had a general or special property in the goods and was entitled to receive the same or the proceeds from the trustee in bankruptcy. After stating the facts the Court said (p. 246):

> "This being so, under all of the authorities, the petitioner had either a general or special property in the merchandise thereby represented, which was valid against all the world."

In a case decided by the United States Circuit Court for the Southern District of New York, *Charavay and Bodvin* v. *York Silk Manufacturing Company,* 170 Fed., 819, the rights of a bank which advances money or credit for the purchase of goods for importation are thus stated:

> "A bank which advances money or credit for the purchase of goods for import, taking the bills of lading in its own name becomes the legal owner of the goods, but its title is not an absolute but only a security title." *Syllabus.*

It was further held that the bank was not then a mere pledgee or mortgagee, and hence its rights or special property in the goods were not lost by the surrender of the goods to the importer for sale or, as was the fact in the particular case, for conversion of raw material into manufactured product. It was also held that the bank could retake the goods from the receiver of the importer and sell the same, and if the proceeds were not sufficient to cover the draft it could recover the deficiency from the receiver of the importer.

The case contains an interesting discussion of some of the cases on the subject of the rights of a bank accepting a draft with invoice and bill of lading attached. All the cases seem to agree in holding that the bank has legal title to the goods, at least a special property or qualified ownership, something stronger than that of pledgee or mortgagee, which gives the bank all the rights of a *bona fide* purchaser or owner to the extent of its advances. See also *In re Cattus,* 183 Fed., 733, p. 735.

The Supreme Court of Connecticut held that the rights of an accepting bank must be worked out on the theory of that of *a purchaser,* taking ownership for security, instead of for profit. See *Baring* v. *Galpin* (Conn.), 18 Atl. Rep., 266, where there is a full discussion of the Federal, State and English authorities.

It is the generally accepted rule in the state courts that a bank accepting a draft with a bill of lading attached has all the rights of a *bona fide* purchaser.

Bank of Rochester vs. *Jones,* 4 N. Y., 497; *Farmers etc. Bank* v. *Logan,* 74 N. Y., 569; *Moors* v. *Kidder,* 106 N. Y., 42; *Drexel* v. *Pease,* 133 N. Y., 129; *Moors* v. *Drury* (Mass.), 71 N. E. Rep., 810; *Moors* v. *Wyman* (Mass.), 15 N. E., 104; *Brown* v. *Billington* (Pa.), 29 At. Rep., 904;

Neill v. *Rogers Bros. Produce Co.* (W. Va.), 23 S. E. Rep., 702.

As the drafts equaled the value of the cotton, and as the accepting banks have suffered damages in loss of interest and enormous costs and expenses of this litigation, their special property in the cotton is equivalent to the entire property therein. Their rights are to be worked out on the same principles of law as would be applicable if they were merchants, importers of cotton, who had bought the cotton in question directly from Steele, Miller & Company. They occupy an even more favorable position, as the question of exact compliance with terms of sale does not arise.

As to the time when the transfer by appropriation took place, according to our understanding of the above cases, it took place on March 23rd in the case of Societe Generale, and in the case of the other defendant banks, on April 6th. On those dates Steele, Miller and Company delivered to the Railroad Company at certain interior points various lots of cotton corresponding in all respects with the cotton described in the drafts and in the attached invoices and bogus bills of lading. By so marking and shipping the cotton they intended to appropriate and did appropriate it to the fulfilment of their contract obligations to the drawees of the drafts. Those contract obligations were to transfer to the accepting drawees the title to the cotton and a special property or ownership therein equal to the amount of the drafts. If the transfer did not take place at the dates mentioned, it certainly took effect on the delivery of the cotton to the ocean carrier at New Orleans, prior to and independent of the subsequent mailing of the custody bills of lading.

The facts to be considered on this branch of the case are clear and undisputed. The trustee states in his bill in each case the facts which make out a case of appropriation when he declares that, in the case of the Societe Generale prior to March 23rd, and in the case of the other banks prior to April 6th, Steele, Miller and Company had acquired, collected, separated into lots and marked the various lots of cotton to correspond exactly with lots and marks of the cotton drawn against, as described in the drafts and attached bills of lading, and on those dates started the cotton on its way to Havre. From that time on there was no turning aside or doing of anything inconsistent with the intention to appropriate the cotton to the obligations growing out of the original transactions between Steele, Miller and Company and the banks. The custody bills of lading were forwarded immediately upon their issuance and before the filing of the petition in bankruptcy, and were obtained and used for no other purpose than to facilitate the banks in obtaining physical possession of the cotton.

We ask attention to the following extract from the deposition of complainant's witness, C. H. G. Linde, pages 214-215.

> "Q. Now, referring to all five cases about which we have been questioning you, making up the cotton loaded on the steamship 'Texas,' when you drew drafts on bogus bills of lading, did your firm expect later to make good by subsequently shipping the cotton which ought to have been shipped at the time of the drawing and forwarding of the drafts?
>
> A. Yes, sir.
>
> Q. That was your original intention?

A. Yes, sir.

Q. In other words it was the original intention of your firm to deliver in this way the cotton against which the drafts had been drawn?

A. Yes, sir.

Q. And you wanted to make delivery in such a way that the acceptors of the drafts would not know that the cotton had not been shipped at the time the drafts were forwarded?

A. Yes, sir.

Q. You had done this frequently before the affair of the Texas cotton?

A. Yes, sir.

Q. How many bales of cotton had you sold and delivered in this way without the irregularity as to the time of shipment being discovered?

A. I am unable to say.

Q. Were there many thousands?

A. Yes, sir; many, many thousands.

Q. Would it not be true to say then, that when you subsequently acquired, assembled and marked and shipped the various lots of cotton covered by the drafts previously drawn, you were simply doing what you had all along intended to do?

A. Yes, sir."

The application of the law of appropriation to the facts leaves nothing of the trustee's case. The banks had a superior right or title to the property long prior to any of the facts or circumstances relied upon as a basis for imputing to them guilty knowledge. Considering the rights of the banks under the original transactions with Steele, Miller and Company, in connection with the subsequent appropriation of the cotton in controversy to the contract obligations growing out of those transactions, it follows that, if the ignorance of the

banks had not prevented them from having any belief on the subject at all, it would have been more reasonable for them to have regarded the acts alleged to have constituted the voidable transfer as transferring to them what they already had title to and what was justly due them rather than as intended to give them an unfair preference.

As Steele, Miller & Company, during almost the entire period of their business relations with the defendant banks, had been fulfilling their obligations under similar drafts and forged bills of lading, it is idle to talk about proof of intention or agreed dates of delivery or grades, etc. They cut no figure in this case, for the reasons stated by the Court of Appeals in the Newman case, and for the additional reason of previous course of dealing, and because we are mainly concerned with consigned cotton.

By reference to paragraph 10 of the answers, quoted above, it will be found that each defendant bank set up that whether it had the full and complete title to the cotton, as it claims, or whether it had a qualified ownership or special property therein, or an equitable lien or charge for a right in the nature of a pledge, its rights or title to the cotton were not created by any voidable or preferential transfer, are superior to any rights or title of the trustee, and entitle it to be awarded the cotton or its proceeds. If the court should not approve of the doctrine of the transfer by appropriation, then we ask that it apply to these cases the principles applied in *Sexton* v. *Kessler,* 225 U. S., 90, 91 (affirming decision of the Court of Appeals, reported in 172 Fed., 535); *In re Automobile Co.,* 176 Fed., 792; *Mills* v. *Virginia, etc., Co.* (C. C. A.), 164 Fed., 168; *In re Brown*

(C. C. A.), 175 Fed., 769; and *Wood* v. *United States Fidelity Co.*, 143 Fed., 424. These authorities justify the contention that the banks had such rights in to or in respect to the cotton that a delivery thereof by Steele, Miller and Company, even after suspension of payment, would not constitute a preference; that taking possession or transfer under such circumstances *relates* back to the time of the original transaction and is supported by the original consideration, which must be considered as a present consideration.

To paraphrase the words of this Court in *Hurley* vs. *Atchinson, etc., Ry. Co.*, 213 U. S., 126: To regard the transaction as one of an independent loan of money to Steele, Miller and Company, and to regard the forwarding or delivery of the ocean bills of lading as a *dation en paiement*, would destroy the obligations of Steele, Miller and Company and place the parties in relation to each other on an entirely different basis from what was contemplated when the original arrangement was entered into.

V.

Independently of the Law of Appropriation the Case is With the Defendant Banks, Because the Trustee Has Failed to Show Actual Intention on the Part of the Bankrupts to Give a Preference and Reasonable Ground for Belief on the Part of the Banks at Any Time That a Preference Was so Intended.

1.—It was not the intention of Steele, Miller & Company, in making the alleged transfer, to give the banks a preference.

This point has already been sufficiently discussed. It clearly appears from peculiar business methods of Steele, Miller and Company, as well as from the testimony on cross-examination of the witness Linde, a member of the firm, that the object of Steele, Miller and Company in shipping the cotton in question when and as they did was not to favor the Havre banks or to defeat the bankrupt law. They were not contemplating bankruptcy. They hoped to continue their kiting operations, and eventually "be able to pull out" Linde (p. 218). They had no partial feelings for the Havre banks. When in the fall of 1909 Linde learned of the fraudulent practices of his firm there was no letting up on the Havre banks. They were drawn on more heavily than ever in December, January and February, until they were loaded to the utmost limit of their obligations d'importation. Even then Linde made efforts to get the banks to enlarge or extend new credits before he sought new victims. He finally drew on Liverpool and Bremen because he had no other resources. He shipped cotton to Havre because that was the only way to continue his business, and because in this way new credits would automatically be opened to his firm. In the language of the letter to Scheuch and Company, cotton was forwarded to the Havre banks "in order to encourage these friends to loosen up for further reimbursement credits." Scheuch's deposition, Exhibit 665, page 477. The cotton in question was started on its way to Havre on or prior to March 23rd, in the case of the Societe Generale, and on or prior to April 6th in the case of the other banks. Steele, Miller and Company were not then anticipating trouble. The cotton was forwarded to the Havre banks because

it was their turn in the turn of the wheel to receive credit. Had the crash been postponed several months the trustee would doubtless have had, as parties defendant to this litigation, the Bremen instead of the Havre banks. See Linde's testimony, pp. 229-230 and 242.

2.—The trustee has failed to show that at the time of the transfer the defendant banks had reasonable ground for belief that a preference was thereby intended.

Ignorance of the acts constituting the alleged voidable transfer precludes the existence of ground for belief that an intended preference is thereby received. One cannot have any belief as to the character of an unknown transfer. That a preferential transfer is not voidable under the statute when made without the procurance or knowledge of the transferee has been frequently held. *McNaboe* v. *Columbian Manufacturing Co.* (C. C. A.), 153 Fed., 967; *Wright* v. *Sampter,* 152 Fed., 196; *Reber* v. *Shulman,* 183 Fed., 564; *Sexton* v. *Kessler and Company* (C. C. A.), 172 Fed., at page 535. In the first three cases there was an admitted transfer within the prohibited period with intent to prefer; but the fact that it was made without the knowledge of the transferee was held fatal to the trustee's suit to avoid the transfer. One of the cases was like the present case in that the transfer was intended to repair a secret fraud of the transferrer against the transferee.

That the banks were entirely ignorant of the subsequent acquisition and shipment of cotton to repair a previous fraud, that they were also entirely ignorant of the fact that the bills of lading held by them were forgeries and hence entirely ignorant of any attempted substitu-

tion of good bills for worthless bills, has been established by the uncontradicted testimony of a number of reputable witnesses.

Presence of reasonable ground for belief that property which one receives is property which belongs to him, to which he is justly and exclusively entitled, cannot coexist with reasonable ground for belief that by the delivery and receipt of such property an unlawful preference is given and received. Believing, as they did, up to receiving news on May 8th of the proceedings taken in Court on May 7th, that the cotton in question was cotton shipped under the bills of lading annexed to the drafts and was therefore cotton which they had paid for and were exclusively entitled to, it never entered into the heads of the banks to believe that any unlawful preference could be involved in the delivery of such cotton to them. It is established by abundant uncontradicted evidence that the belief which we have shown to be inconsistent with the belief that a preference was being received was actually entertained in good faith by the banks and was the natural result of fraud and deception practiced upon them.

As we understand the position of the other side, it is not claimed that the defendant banks had actual knowledge or belief that they were receiving an unlawful preference. The contention is that such knowledge or belief must be imputed to them, first, because of the two sets of bills of lading representing the cotton in question, second, because of the alleged knowledge by the banks of the insolvency of Steele, Miller and Company, and third, because of so-called suspicious circumstances.

The existence of one of the sets of bills of lading,

the custody bills, was not known to the banks until their arrival in Havre on April 26th, in the case of the Societe Generale, and on May 3rd and 7th in the case of the other banks. Knowledge that Steele, Miller and Company had suspended payment did not reach Havre until April 29th and then no facts in regard to their real financial condition were known. The alleged suspicious circumstances did not exist prior to April 26th.

Now if the transfer took place on or prior to April 26th it is unnecessary for the Court to consider the grounds relied upon to show reasonable cause to believe. A transfer cannot be avoided because of what the transferee came to believe subsequent to the transfer. We maintain that—

(1) The transfer took place by operation of the law of appropriation on March 23rd in the case of the Societe Generale and on April 6th in the case of the other banks, or at least on the dates when the previous appropriation was perfected by the delivery of the cotton to the ocean carrier. This delivery took place on April 15th in the case of the Societe Generale and, in the case of the other banks, at various dates not later than April 25th.

(2) The transfer took place irrespective of the doctrine of appropriation, when Steele, Miller and Company parted with the *jus disponendi* and lost the possession of and title to the property, so that it was beyond their control and not subject to seizure by their creditors. This took place when the cotton was delivered to the ocean carrier and certainly when the endorsed bills of lading were forwarded, about April 15th in the case of the So-

ciete Generale, and in that of the other banks at various dates prior to April 26, and in possibly two instances on April 26th.

The proposition contained in (1) has been sufficiently discussed under the heading IV of this brief. We shall now take up proposition (2).

The cotton in question was intended for the defendant banks. Mr. Linde so testifies. It was intended as a performance of the obligations incurred when the drafts were drawn, which obligations were to transfer to the banks title to the cotton. For this reason the cotton in question was divided into lots and marked to correspond identically with the cotton described in the drafts and in the documents attached thereto. The cotton was acquired and brought to New Orleans for the purpose of performing the obligations due directly to the drawee banks to transfer and deliver to them the title to the cotton. The whole history of the affairs, the rights and obligations of the parties, all compel the conclusion that Steele, Miller and Company had no intention to reserve title in themselves after they had endorsed and mailed the custody bills of lading. And their intention is in accord with the legal effect of their acts. Delivery of the goods to the carrier and mailing of the endorsed bills of lading put an end to the *jus disponendi* in Steele, Miller and Company. They could not thereafter regain possession. No creditor of theirs could levy on the cotton.

We call attention to the following pertinent authorities:

> "It is necessary that the bill of lading be delivered in order to pass the goods, and an endorsement without delivery will not suffice. But put-

ting in the post office, addressed to the indorsee or to another for him, would constitute a valid delivery."

II Daniels on Negotiable Instruments (5th Ed.), Sec. 1743.

In the case of *Fetter* v. *Field*, 1 La. An., 80 (pp. 83-84), it was held that, from the date of the mailing of the bill of lading, the goods ceased to be in the possession or control of the shipper, and hence, were not subject to seizure on shipboard before departure of the vessel at the suit of one claiming a vendor's lien against the shipper.

So, in *Flash Lewis & Co.* v. *Schwabacher & Co.*, 32 La. An., 356, the Court said that it had been frequently decided in Louisiana that the creditors of a shipper could not seize goods after he had lost control and possession by delivery of the goods to a carrier and remitting the bills of lading therefor to the consignee.

It is horn-book law that a negotiable bill of lading represents the property, and the delivery of a bill of lading, indorsed in blank, constitutes a delivery and transfer of the property; that delivery to the common carrier for transportation to the vendee is a delivery to the vendee's agent and equivalent to a delivery to the vendee himself. The statutes and jurisprudence of Louisiana, which are in accord with the general law, are to the effect that the transferee of a negotiable bill of lading is the possessor and owner of the goods with full dominion over them. *The Bank* v. *Meyer & Co.*, 43 La. An., 1; *Scheuermann* v. *Monarch Fruit Company*, 123 La. Rep., 55; *Hardie* v. *Vicksburg S. & P. Ry. Co.*, 118 La. Rep., 253.

If, in the case of *Lovell* v. *Newman* (192 Fed., p. 758), the trustee was unsuccessful in his argument that the bankrupts retained the title to and *jus disponendi* of the cotton because they retained the genuine bills of lading made to their order, how can the trustee here hope to succeed in his argument that, under like circumstances, the title to and *jus disponendi* of the cotton still remained in the bankrupts, *after* they had endorsed and parted with the genuine bills of lading?

Substituting banks for "spinners" the following quotation from *Lovell* v. *Newman* (p. 758), is directly applicable:

> "In the present case there are no intervening rights of third parties; the contest being between the bankrupts and their trustee on the one hand and the spinners on the other. In the absence of the bankruptcy of the parties, what would have been the attitude of the bankrupts? Could they have recovered the cotton or its value from the spinners? They had once been paid full value, and it would be shocking to the sense of justice to suppose that they could have enforced a second payment. If parties by their own fraudulent conduct may be estopped, the application of the doctrine would effectually cut them off from asserting that they had not delivered the cotton in pursuance of their solemn contracts."

The above conclusion was reached independently of the operation of the law of appropriation. For, immediately after the words quoted above, the Court declared that it might go further, and that it was clearly of the opinion that the delivery of the cotton to the carrier

vested ownership in the spinners upon the theory of an intended appropriation.

It matters not that the bills of lading were addressed to Scheuch and Company for delivery to the banks. Scheuch and Company's possession was for the banks and enured to their benefit from the time such possession began. Steele, Miller and Company owed the cotton directly to the banks. They were, moreover, under obligation to Scheuch and Company to perform their obligations in the premises to the banks, and Scheuch and Company had guaranteed the performance of such obligations. There is not a particle of evidence to support the contention that the intention of Steele, Miller and Company was to part with the title and possession in favor of Scheuch and Company and not of the banks.

In *White* v. *Pollock,* 117 Mo., 467, 22 S. W., 1077, 38 Am. St. Rep., 671, the opinion says:

> "The delivery [of a deed] need not be to the grantee in person. A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, will constitute a good delivery, though the grantor is dead at the date of the last delivery; for the delivery takes effect by relation as of the date when first made to the third person. In such cases it should appear that the grantor parted with all dominion and control over the instrument, intending it to take effect and pass title as a present transfer."

To the same effect is *Bury* v. *Young,* 98 Cal., 446, 33 Pac., 338, 35 Am. St. Rep., 186; and the opinion goes further to hold that when a deed is given a third person to be delivered to the grantee after the grantor's death and the circumstances surrounding the transfer show that

the grantor intended to surrender his control over the instrument, evidence that he afterwards executed other deeds purporting to convey the same property, and that he also ordered the depositary to restore the deed, is incompetent for the purpose of showing what his intentions were in transferring the deed to such depositary.

To say that the bills of lading were mailed to Scheuch and Company as agents of Steele, Miller and Company and that as long as thhe bills of lading were in the possession of Scheuch and Company they were in the possession of Steele, Miller and Company and subject to their control, is an utterly untenable proposition. In the first place it is not consistent with the allegations of the bill, which are to the effect that the bills of lading were transmitted for the purpose of making a preferential transfer either to Scheuch and Company or to the banks or to both. In the next place, for Steele, Miller and Company to attempt in that way to retain title to or control over the cotton would be in violation of their obligations to Scheuch and Company as well as to the banks (*Heffner* v. *Gwynne-Treadwell Cotton Co.* (C. C. A.), 160 Fed., 638-9, and *Eichel* v. *Sawyer,* 44 Fed., p. 845); and both Scheuch and Company and the banks could have successfully resisted any attempted exercise by Steele, Miller and Company of any rights of ownership over the cotton.

It is idle to say that there was a conditional transfer only, *i. e.,* upon condition of return of the forged bills of lading and that failure to comply with the condition gives Steele, Miller and Company a right to revoke the transfer. It is a sufficient answer to say that this is not a suit to revoke a transfer on account of failure to per-

form conditions attached thereto. Again there is no proof that there was any such condition precedent; it was simply a request or desire to get back the incriminating documents. To insist upon their return as a condition precedent would have brought about the disclosure which was sought to be avoided. Finally, no court will give effect to a condition having for its sole object to conceal a fraud in order to keep the way open for further frauds.

We submit that after Steele, Miller and Company had performed their obligation to Scheuch and Company and to the banks by delivering the cotton to the carrier and mailing the bills of lading, they, from the moment of mailing, lost the *jus disponendi.* They were powerless to undo what they had done by forbidding Scheuch and Company to turn over the documents to the banks. Scheuch and Company were under a legal obligation to deliver the bills of lading to the banks and the banks could have compelled them to do so. Steele, Miller and Company could not have compelled Scheuch and Company to hold or return the bills of lading.

Hence, from the moment of mailing, the transfer took place irrevocably so far as Steele, Miller and Company are concerned, and whether or not the transfer is voidable depends upon the state of facts existing at the time of mailing. It is not pretended that at that time the banks could possibly have had any suspicion of a guilty knowledge.

But if all the foregoing contentions be decided against us there still remains an insuperable bar to the trustee's recovery and that is, that the banks were ignorant of the alleged transfer and were firm in the belief that the

original bills of lading were genuine and that they had long been in constructive possession of the cotton and were justly and exclusively entitled thereto.

Knowledge of Steele, Miller and Company's suspension of payment on April 29th would afford no knowledge or notice of the forgery of the original bills of lading or of the transfer of subsequently acquired cotton, nor would it alter the belief of the banks in respect to a title or right to the cotton, complete and perfect prior to April 29. *Hence, the sole reliance of the trustee for proof of the all-essential knowledge of the alleged voidable transfer is the existence of duplicate sets of bills of lading.* We hardly feel it necessary to enlarge upon the summary of the argument given in the Statement of the Case.

The case of the "Texas" cotton was not the first occasion of the existence of duplicating bills of lading. The same things had occurred with more or less frequency during the season of 1909-10. At the first occurrence in December, 1909, explanations were asked and Steele, Miller and Company replied that the object was to facilitate and expedite the movement of cotton at the time of congestion at the port of New Orleans and that the ocean carrier had been willing to issue custody bills without previous delivery of the outstanding through inland bills of lading because of their confidence in Steele, Miller and Company and in reliance upon their guarantee of the return of the outstanding bills. This explanation had been accompanied by a statement of Scheuch and Company that the custody bills had been received without any charges attached thereto, that Steele, Miller and Company were a responsible firm whose representations

could be relied on, etc. The explanations were confirmed by Linde, when he was at Havre in January, 1910, who explained how custody bills of lading would result in giving preferential movement to cotton covered thereby (pp. 201-204). These explanations, plausible in themselves, were rendered a thousand times more plausible by the frequent arrival and receipt of the cotton without any trouble.

That the banks were deceived, and believed that the custody bills represented the same cotton covered by the bills attached to the drafts, is testified to by every witness who has been examined on the subject, including Linde, who was produced and has been vouched for by the trustee. It was to the interest of the banks not to be deceived. Hence it cannot be said that when the explanations were first given the banks were purposely credulous in their own interest.

It cannot be said that the explanations were so transparently false that no sensible man should have believed them—first, because four sensible men did actually believe them; second, because one of the three expert bankers examined by the trustee, Mr. Breton, the only one to whom the facts were explained, declares he would have acted as did the French banks; and third, because, considering the hazy knowledge foreign bankers had on the subject, the explanations were plausible and well calculated to deceive. Moreover, it must not be lost sight of that at the time the explanaions were given it was to the interest of banks to suspect the truth. This is shown by the answer of Mr. Dubois to Interrogatory 18, quoted above. That they were believed is shown by the fact that the banks continued to accept drafts for large

amounts, and three out of the four Havre banks, during the season of 1909-10, increased the limits of their reimbursement credits.

Hence the appearance of the custody bills of lading covering the "Texas" cotton was an occurrence not out of, but in accordance with, the course of business between the parties. It would be natural for the banks to have the same belief in respect to them as they had had on previous similar occasions. There is, therefore, no good reason why the Court should not believe the sworn declarations of the representatives of the banks, that they continued to believe that the custody bills represented the same cotton as the bills of lading annexed to the drafts and that the sole purpose and effect of the custody bills was to facilitate the movement of the cotton through the port of New Orleans. If this be true, they were entirely ignorant of the fact that they were receiving good bills for bad or that Steele, Miller and Company were thereby intending to give them a preference by transferring to them cotton not covered by their original bills but subsequently acquired.

But it is said that the banks ought to have suspected something because at the time of the arrival of the custody bills, Steele, Miller and Company were known to be in financial difficulties. What necessary or probable connection is there between knowledge on April 29th, of that firm's suspension of payment and their forgery of bills of lading several months before? We don't see any connection. Certainly such knowledge as the banks had at the time of Steele, Miller and Company's financial condition cannot justify the Court in holding, in disregard

of their positive testimony, that they should have suspected the frauds of which they were the victims.

Again it is said that the failure of Knight, Yancey and Company and the subsequent disclosures should have led the banks to suspect something when they saw the duplicating bills of lading. This case is to be determined, not by what trustee's counsel calls "the world's knowledge," but by the evidence in the record. The record is singularly barren of proof as to what disclosures followed the Knight, Yancey failure, how closely they followed it, etc. See answer of Dubois to cross-interrogatory No. 21 (p. 678). The Havre banks lost nothing by the Knight-Yancey failure. Moreover, Knight, Yancey and Company made no use of custody bills. In the presence of the uncontradicted testimony showing absence of actual knowledge or belief, the Court would not be justified, by reason of the Knight-Yancey episode, in imputing even a suspicion of the truth. If it were proven as a fact that, after the fraudulent practices of Knight, Yancey and Company become known, every European banker suspected every American exporter of cotton, it could not be said that this gave any banker any notice of the fraudulent practices of any exporter.

Finally it is claimed that the fact that, contrary to what was done in other cases, the original bills of lading were not returned on receipt of the custody bills of lading in the case of the "Texas" cotton, should lead the Court to suspect that the banks suspected something. But, if the Court must attribute to the banks a suspicion which they declare they did not have, we submit it should be merely *that they suspected, not that they were being made the recipients of an intended preference, but that*

they had been the victims of a fraud. The record, however, contains a reasonable explanation. The retention of the original bills was due to distrust of the continued effectiveness of Steele, Miller and Company's arrangements for delivery of the cotton without surrender of the outstanding through bills, and was not due to a belief that the retained bills were bogus. Why retain worthless forgeries? The banks had been led to believe that the issuance of the custody bills and the delivery of the cotton without production of the through railroad bills had been permitted by the steamship company on account of its faith in Steele, Miller and Company and in reliance upon the latter's guarantee. They naturally feared that the knowledge of the frauds of Knight, Yancey and Company and the rumors as to the solvency of Steele, Miller and Company might lead the steamship company to have less faith and less reliance on guarantees, and thus to insist upon the production of both sets of documents. So as a matter of prudence they retained both sets of bills of lading. See answer to cross-interrogatory 29 of Mr. Dubois and of Mr. Lysell to direct interrogatory No. 26 (pp. 713-714 and 594).

But it is said that Scheuch and Company, in transmitting the custody bills for the "Texas" cotton omitted to ask for the return of the through railroad bills. This may be significant of the fears and belief of Scheuch and Company. If the banks were chargeable therewith the trustee would not now be asking the Court to draw strained inferences; for the fraudulent practices of his firm were disclosed by Linde to Scheuch and Company in March, 1910. All the testimony is to the effect that this revelation was concealed from the banks. It is de-

clared by Scheuch and by Schilling, implied in the testimony of Linde, and is a necessary inference from all the facts and circumstances, that it was not intended that the confession to Scheuch and Company should be communicated to the banks. It is settled law, however, that, even if Scheuch and Company were acting solely as the agents of the banks, the latter would not be affected by knowledge of their agents under such circumstances. 31 *Cyc.*, pp. 1595-6; *American Surety Co.* v. *Pauly*, 170 U. S., p. 157; *Kettlewell* v. *Watson*, 21 Ch. Div., p. 687; *Cowan* v. *Curran* (Ill.), 75 N. E., p. 329; *Reinhard on Agency*, p. 356.

It has doubtless already occurred to the Court that the most that can be expected from the above circumstances relied upon to show knowledge of the transfer or reasonable cause to believe is that your Honors should suspect that the banks suspected or should have suspected something wrong. But a decision against defendants based in the most important element upon a suspicion of a suspicion would be *sui generis* among cases attacking preferential transfers.

In this connection, we may as well answer the argument based on sundry communications between Scheuch and Company and Steele, Miller and Company, on cablegrams, statements of Linde as to the banks' anxiety, etc. None of these things has been shown to be authorized by or known to the banks. They are irrelevant and *res inter alios actae.*

For instance, the impression which might be produced by the testimony of Mr. Linde, that the banks were in a constantly growing state of uneasiness and alarm from January, 1910, on should not be allowed any effect

against the banks. So far as the testimony has any foundation, it rests upon purely hearsay evidence. It is not based on any communications which Linde or Steele, Miller and Company had with the banks. Nor can any inference against the banks be drawn from the use of their names in letters or cables from Scheuch and Company to Steele, Miller and Company, in the absence of proof that they authorized or knew of the statements contained in such communications. Certainly must this correspondence be given no effect against the banks in view of Mr. Scheuch's declaration in answer to interrogatory 33, which reads as follows:

> "I hereby testify that the Havre banks have never been alarmed nor have they held meetings about Steele, Miller and Company and I did not give such information to Mr. Linde. The banks have asked us occasionally on which steamer such and such cotton would arrive, as sometimes the drafts were falling due and the cotton had not yet arrived, but therefore they had never been alarmed as the delay was nothing unusual to them. Scheuch and Company, when cabling or writing to Steele, Miller and Company to hurry forward certain cottons have several times mentioned the names of the banks, as if they had charged us to claim, but this has been merely done by Scheuch and Company because they believed that then Steele, Miller and Company would attach more importance to these letters or cables. In reality never any of these banks had charged us to do this" (p. 365).

It will appear from the depositions and exhibits that the remonstrances about delay in the movement of cotton and efforts to secure expedition in forwarding the same were continuous during the winter of 1910 and were

not peculiar to March or April. The desire to hasten the arrival of cotton drawn against has a too obvious and natural explanation than to justify its use as proof of an exclusive knowledge or even suspicion of facts which a month or two afterwards astounded the unsuspecting business world. The fact that Steele, Miller and Company had created the belief that obtaining port bills of lading would greatly expedite and facilitate the movement of cotton after it reached this port affords a natural explanation of the desire to have such port bills obtained to cover the delayed cotton. The general uneasiness following the disclosure of Knight, Yancey and Company's frauds explains the desire for proof that the cotton had actually been delivered to the ocean carrier; but it is very far from the beginning of proof of the existence of suspicion in respect to a transfer long before determined upon and executed by the transferrer without the procurance or knowledge of the transferee.

If it is the contention of the trustee that the shipment of the cotton and the issuance and forwarding of the custody bills of lading had any connection with the Knight, Yancey and Company failure, it is a conclusive answer to show that the cotton of the Societe Generale was delivered to the ocean carrier at New Orleans on April 15th, prior to the Knight-Yancey failure, and that the cotton of the other banks had been delivered to the inland carrier on April 6th, under the arrangements, which were afterwards carried out, for its delivery at the port of New Orleans to the ocean carrier and for the immediate forwarding of the ocean bills of lading therefor. If the alleged transfer was determined upon and wholly or almost wholly executed prior to the Knight-

Yancey failure, is it not illogical in the extreme to judge of its intention and character by reference to rumors and fears which did not exist until after the disclosures following the Knight-Yancey failure had become known? *It cannot be doubted that everything which was done would have been done just as it was done, if the Knight-Yancey failure and its consequent disclosures had never taken place.*

Suppose we admit, what has not been proven, that the air was full of rumors during the last week of April, 1910, and that there was a feeling of uneasiness in the minds of all who had parted with money on the faith of bills of lading for cotton not yet arrived. Such admission would be far from making out the beginning of a case of a fraudulent or preferential transfer concocted or connived at by the defendant banks. The banks did not thereafter ask Steele, Miller and Company to do anything nor did they do anything themselves nor did they believe that anything was necessary to be done to protect their rights or to secure for themselves preferential rights. As for Steele, Miller and Company, the cotton was already en route to Havre, having been started on its way pursuant to the intention formed when the drafts were drawn and in accordance with methods of business which they had adopted months before.

It must never be lost sight of that the acts of Steele, Miller and Company, alleged to constitute a preferential transfer, were done by them without the knowledge or procurance of the banks, were acts which they had from the start intended to do, which involved no change in the business methods which they had for a long time pursued, and had for their object and effect to give to the

banks no other or greater rights than what the banks originally contemplated were entitled to and had paid for, and always believed they were in the secure possession of.

This is an appropriate place to direct attention to a defect in the trustee's proof. He has failed to prove when Steele, Miller and Company acquired, assembled, marked and thus appropriated the various lots of cotton concerned in this suit. For aught that appears in this record, the cotton in question might have been on hand at the time of the drawing of the draft. The trustee cannot possibly ask the Court to hold that any more suspicion engendered by the existence of the duplicate bills of lading amounts to notice or constructive knowledge of any more facts respecting the cotton than the trustee has been able to prove in this case. Now, what are those facts?

In the case of the Societe Generale the genuine bills of lading under which the cotton actually moved to New Orleans are alleged to have been dated February 7, 1910, which corresponds with the date of the drafts, February 8th. It is alleged that they were fraudulently antedated, but no attempt was made to prove this. Would not knowledge that the cotton was shipped at the date of the drafts allay any suspicion which might otherwise have been aroused? It is alleged that on March 23, 1910, the cotton, already acquired, assembled, marked, etc., started on its way to New Orleans, but the trustee made no attempt to show how long the cotton had previously been in the possession of Steele, Miller and Company.

And so, in the case of the other banks, if they be

charged with constructive knowledge of all the facts which the trustee now knows and has been able to prove, they would not have known how long before April 6th the cotton had been acquired. It might have been in the hands of Steele, Miller and Company at the time of the drawing of the drafts. The trustee cannot argue on the assumption that Steele, Miller and Company did not own and possess the cotton at he time they drew drafts against it. Nor can he charge the banks with knowledge that the cotton was acquired subsequent to the drafts purporting to be drawn against it.

We submit that the trustee has completely failed to prove the absolutely essential fact that any of the banks knew or ought to have known even that the alleged transfer had taken place and *a fortiori* has he failed to show the existence of reasonable ground for belief in respect to the unknown transfer. Hence our confident belief that judgment must be for defendant.

The alleged knowledge of insolvency does not help the trustee. Knowledge of insolvency cannot create a belief in respect to an unknown transfer. If the banks believed that their original bills of lading were genuine, represented cotton shipped at the time, paid for by their drafts, then they must have believed that they had title to and constructive possession of the cotton from the dates of the bills of lading and that their just title and exclusive rights could not be affected by Steele, Miller and Company subsequently becoming insolvent.

We again submit that the trustee cannot recover, because upon the most essential part of his case, proof of guilty knowledge, he has not proved knowledge or notice

of the actual facts and has been forced to rely upon a suspicion.

The trustee's case may be thus generalized: The bankrupts had for a long time employed peculiar business methods which were fraudulent and therefore concealed from their customers. A mischance brought upon them sudden bankruptcy, followed by a discovery of their fraudulent methods. Relying upon circumstances incident to the peculiar business methods of the bankrupts and common to a long series of similar transactions, the trustee imputes to the transaction immediately preceding the bankruptcy a motive (intention to prefer) which the other similar transactions did not have, and charges that it was sufficient to afford notice or arouse suspicions which the other transactions did not create. To this contention, which involves an inference unsupported by evidence, we urge that the last transaction, which followed the regular course of business, should be regarded as having the same character as those which preceded it, both in respect to intention of one party and ignorance of the other party, and our contention is supported by the uncontradicted testimony of the parties to the transaction.

VI.

The Case of Paul Chardin.

The case of Paul Chardin in respect to the defense of want of reasonable cause for belief that a preference was intended to be given is on all fours with that of the Havre banks. If we thought there was anything in the

trustee's claims based on the recurrence of duplicating bills of lading, we would say Paul Chardin's case was stronger, because he had never before received duplicating bills of lading. In respect to the defense based on rights resulting from the doctrine of appropriation, his case, in our view of the law, is as strong as, and in what we understand to be the view of the trustee's counsel, is stronger than, the case of the Havre banks. For he was a purchaser for his own use of the cotton in question.

It is therefore only out of abundant caution that we present now a discussion of certain side issues or special features of the Chardin case.

In his bill of complaint the trustee alleges that on or prior to April 15, 1910, Steele, Miller and Company were indebted to Chardin in the sum of $72,557.12, being the aggregate amount of the drafts accepted by him in the month of January previous, to which drafts were attached spurious bills of lading purporting to represent 1,000 bales of certain described marks and lots; that thereafter, on or before April 6, 1910, Steele, Miller and Company acquired, assembled, separated into lots and marked 1,000 bales of cotton to correspond with the cotton described in the drafts and in the bogus bills; that said cotton was brought to New Orleans, delivered to an ocean carrier for transportation to Havre and negotiable bills of lading therefor were forwarded to Scheuch and Company for delivery to Paul Chardin to take the place of the forged bills, and "that the transmission of said port bills of lading to be substituted for the said fraudulent bills was done with the intent to prefer the said Paul Chardin," etc.

The bill asserts that Steele, Miller and Company have

actually transferred the cotton in question to Chardin in discharge of their obligations arising from the drawing of the drafts with spurious bills of lading attached and seeks to avoid this transfer on the statutory grounds as constituting a voidable preference.

Unlike the Havre banks, Chardin had no obligations d'importation with Scheuch and Company. He was not a bank assisting an importer of cotton by reimbursement credits. He was a merchant buying cotton for his own use, having the drafts therefor drawn on himself, thus saving or earning for himself the bank's commission.

As to the relations of Paul Chardin to the cotton described in the drafts accepted by him, we do not understand the testimony of Mr. Linde. He seems to admit that Chardin has all the rights which any of the defendant Havre banks have in respect to the cotton covered by the drafts drawn on them. This is sufficient for our purpose. But he seems to deny that as a merchant purchasing cotton Chardin had any right to demand the particular cotton which as a banker he was entitled to have delivered to him. On page 208 the witness said:

> "Q. I don't know that I clearly understand you. When Paul Chardin paid these drafts what did he expect to get in consideration for the thing?
>
> A. The bank commission.
>
> Q. Nothing else?
>
> A. Nothing else.
>
> Q. But the drafts were a good deal larger than the bank commissions?
>
> A. Why, certainly, but Paul Chardin acted as a bank in this transaction.
>
> Q. Do you mean to say that you did not sell any cotton to Paul Chardin?

A. Certainly, for deliveries.

Q. Suppose this cotton had come there, would it not have been turned over to Paul Chardin?

A. No, sir; it would have been turned over to the bank Paul Chardin.

Q. Would not Paul Chardin the bank turn it over to Paul Chardin the merchant?

A. No, sir.

Q. How would the merchant get the cotton that he bought?

A. Paul Chardin can never get the cotton drawn for against these drafts, but other cotton instead answering to description the delivery contract called for. The out-turn of this cotton might be fully good middling or fully middling while the delivery contract called for good middling. So this cotton would not have answered the description stipulated in the contract.

Q. Your theory is that Paul Chardin had a right to hold this cotton and was entitled to it only as a banker who had cashed drafts drawn for the price of the cotton?

A. In this transaction Paul Chardin was to be treated exactly on the same basis as the Banque de Mulhouse or the Comptoir d'Escompte de Mulhouse or the Societe Generale or any of those Havre banks.

Q. He had the title to the cotton by reason of his acceptance of the draft only, and not because he had purchased this particular cotton?

A. Yes, sir."

There seems to be a conflict between Mr. Scheuch and Chardin's representative, Mr. Riss, on the one side, and Mr. Linde on the other.

Mr. Riss testified, pp. 491 ffg., that Paul Chardin is an individual, owner of the commercial firm of Paul Char-

din of Paris with a branch office at Havre, and is engaged in the business of buying and selling all kinds of merchandise, the branch at Havre being engaged in the cotton import and commission business. Interrogatory 1. Paul Chardin has never had so-called engagements d'affairs with Scheuch and Company, but bought frequently through Scheuch and Company as agents of American cotton exporting firms, which they represented at Havre, including Steele, Miller and Company. Paul Chardin also bought from Scheuch and Company important quantities of cotton on the spot; this business was done by Scheuch and Company under their own name as merchants. Interrogatory 7. The aforesaid purchases which Chardin made from American shippers were effected on firm offers submitted by Scheuch and Company in the name of the American shippers, and it was always understood that these shippers had to make themselves pay for the selling price of the cotton by drawing documentary drafts on Paul Chardin. The documents were turned over on acceptance of the drafts, and by paying the drafts Chardin paid the purchase price of the cotton which he had bought. Interrogatory 8. A commission of three-sixteenth per cent. on the drafts was allowed. Chardin never had any knowledge of or interest in the contracts or arrangements which Scheuch and Company may have had with American cotton shippers, who were drawing drafts on him. He never had the intention to give and has never given any credit to any American shipper or to Scheuch and Company. He has never authorized drawing on his firm except for the amount of merchandise which he had bought for his own account from sellers and as a means of payment of the

purchase price in execution of the contracts. Interrogatory 10. This includes Steele, Miller and Company. Interrogatory 12.

He makes the same declarations as do the representatives of the Havre banks in respect to his belief in the genuineness of the bills attached to his drafts, that he thereby acquired possession of and full dominion over the cotton, his ignorance of the fraudulent practices of Steele, Miller and Company, etc. He states the receipt of the custody bills of lading, seven on May 3rd and three on May 7, 1910, and that the originals have never left the possession of Paul Chardin and are still in his possession and control. Interrogatory 16. The issuance of these custody bills were without the knowledge of Paul Chardin, who believed that they represented the same cotton as had been shipped under the original bills, and was in entire ignorance of the acts of Steele, Miller and Company in subsequently acquiring, marking, shipping, etc., the cotton in question. Interrogatory 17. He testifies in like manner, as do the directors of the Havre banks, as to the ignorance of Paul Chardin concerning the financial affairs of Steele, Miller and Company and concerning any intention of theirs, to give Chardin a preference; that when Chardin acquired the custody bills he did not know or believe that he acquired another interest or right in or to the cotton purporting to be covered thereby in addition to what he believed he already had as the acceptor of the ten drafts and the owner of the through bills of lading attached thereto; but he believed that the delivery of the custody bills of lading was only a continuation of the operation which consisted from his side in the purchase of the 1,000 bales of cot-

ton and the acceptance of the documentary drafts drawn on him against this cotton by Steele, Miller and Company. Interrogatory 21.

The knowledge which Chardin had since April 29th of Steele, Miller and Company's suspension of payment did not effect his perfect belief and confidence when he received the custody bills of lading, on May 3rd and 7th, in the solidity of his rights on the 1,000 bales of cotton resulting from the acceptance of the drafts with the through bills of lading attached, because he believed the custody bills represented the same cotton of which he had paid the purchase price and that he alone had the right to receive the same on its arrival at Havre. (Interrogatory 23.)

The 1,000 bales of cotton per steamer "Texas" were forwarded by Steele, Miller and Company to Chardin, not in virtue of a "credit de reimbursement" which Chardin had opened to them as their bankers but in fulfilment of certain contracts of sale. The drafts never had any other reason than to settle the purchase price. "Therefore Paul Chardin expected the 1,000 bales of cotton as the buyer of it and he considered himself as such." (Interrogatory 27.)

The commission charged by Chardin on the drafts in question are such as all Havre cotton merchants customarily charge who make it a rule to have drafts drawn on themselves by American shippers against cotton bought for their own account. (Cross-Interrogatory 4.)

In his answer to cross-interrogatory 25, the witness said:

> "On account of the urgent needs for cotton, which Paul Chardin had, I asked Scheuch and

> Company personally if they could not oblige me in delivering to Paul Chardin some cotton from their stock instead of the cotton of Steele, Miller and Company, which was arriving slowly and as Scheuch and Company accomplished this desire it happened that on arrival of the cotton shipped by Steele, Miller and Company to Paul Chardin it went definitely into the hands of Scheuch and Company personally in exchange of the merchandise which they had advanced to Paul Chardin for their own account as merchants."

In the next interrogatory he shows that Chardin's contracts of purchase from Steele, Miller and Company for monthly deliveries which were drawn against, aggregated 6,000 bales. While Chardin paid Steele, Miller and Company for all this cotton, only 4,400 bales arrived at Havre. Of the balance, 1,000 bales, purchased under the contract cipher "Geof," is the 994 bales now in suit and 600 bales is cotton which is altogether missing. And in his answer to cross-interrogatory 28 he says that, while Chardin was not obliged to accept any kind or grades of cotton which Steele, Miller and Company might choose to deliver, he always believed that the drafts were made against cotton which Chardin had to receive against the delivery contracts.

> "If Scheuch and Company would not have been willing or able to advance to Paul Chardin in order to oblige him some of their spot cotton, then Paul Chardin would have been bound to await the arrival of the cotton shipped to him by Steele, Miller and Company."

He was not aware that Steele, Miller and Company had a stock of cotton at Havre, but he remembers only

that Scheuch and Company as merchants and under their own name had cotton for sale with the various Havre spot brokers and he had bought many times spot cotton from Scheuch and Company. (Cross-Interrogatory 30.) Chardin never had any arrangement with Scheuch and Company for account of Steele, Miller and Company under which his acceptances had to be reimbursed by cotton of the stock at Havre of satisfactory grades. On the contrary the shipments made by Steele, Miller and Company against drafts on Chardin had to be of cotton in conformity with cotton which Chardin had bought to be delivered against the contracts. There was no contract or agreement in virtue of which Chardin sometimes got a loan or advance of cotton from the stock of Scheuch and Company. Each occasion he addressed himself personally to Scheuch and Company asking the loan or exchange as a favor. (Cross-Interrogatory 31.) He declares that "the advancing of some spot cotton by Scheuch and Company as carefully explained under 25 and 31 of this cross-interrogatory has been made by them (Scheuch and Company) under their own name as merchants and not at all as agents of Steele, Miller and Company." (Cross-Interrogatory 32.)

Mr. Scheuch, in his testimony, corroborates Mr. Riss in all essentials. See his answers to direct interrogatories 29, 30 and especially 31. In the course of his answer to Interrogatory 31 he said:

> "It happened that the cotton which Steele, Miller and Company had shipped and drawn on Paul Chardin, did not arrive in time to make the delivery at the time Paul Chardin needed his cotton purchased, and in these instances Paul Chardin asked Scheuch and Company either verbally or

by phone, if they could oblige him in delivering some of their spot cotton instead of waiting until the cotton, which was shipped to him by Steele, Miller and Company would arrive. As Scheuch and Company wanted to oblige Paul Chardin and as they also wanted to avoid any claim for penalty by Paul Chardin against Steele, Miller and Company on account of the delay in delivery, they agreed to the demand of Paul Chardin and delivered to him cotton from their stock warehoused at Havre, in exchange of the cotton in course of shipment to Paul Chardin. Scheuch and Company were not bound at all to do this, and if they would not have had a stock of cotton at Havre, wherein to find the suitable cotton for Paul Chardin according to the contract conditions with Steele, Miller and Company and him, Scheuch and Company would not have been able to advance any cotton to Paul Chardin. These transactions have been special transactions between Paul Chardin and Scheuch and Company acting as merchants for their own account" (p. 363).

In the course of his answer to Cross-Interrogatory 22, he said:

"Referring to the transactions of Paul Chardin with Steele, Miller and Company, I can only repeat that the understanding of Paul Chardin and ours was such, that Steele, Miller and Company had to draw only on Paul Chardin against cotton, which was to be delivered against those delivery contracts, as otherwise Paul Chardin would not have allowed those drafts, as he did not intend to open any other credit for reimbursement to Steele, Miller and Company. The transactions, which took place later on account of the delay in shipping through cotton drawn for, were merely transactions between Scheuch and Company and Paul Chardin to

> oblige the latter and they would not have been possible if Scheuch and Company would not have had a big stock of cotton at Havre, in which event Paul Chardin would have been forced to await the cotton shipped to him. If Steele, Miller and Company and Mr. Linde have understood these transactions in another way, then they have made a mistake, which I regret" (pp. 382-3).

The differing views of Mr. Linde and of Mr. Scheuch and Mr. Riss do not affect the main essential facts upon which rest Paul Chardin's defense against this suit, wherein the trustee seeks to set aside as a voidable preference the shipment of the 1,000 bales, reduced by shortage to 994 bales. There is still lacking proof of an intention to give a preference and proof of reasonable ground for belief that a preference was intended. If he is not entitled to the cotton as actual purchaser, he is entitled to it as banker accepting drafts drawn against it.

That Scheuch and Company and Riss are correct and Linde in error, as to the cotton covered by the drafts on Chardin being the cotton to be delivered to him under his contracts of purchase, becomes clear when we consider that Scheuch and Company had no free cotton of Steele, Miller and Company to deliver to Chardin. The cotton consigned to Scheuch and Company was all covered by drafts on the banks for its full value and was in their possession and control until sold and the proceeds turned over to them. Scheuch testifies that his firm never had any cotton of Steele, Miller and Company without having previously paid its full value. (Answer to Cross-Interrogatory 23, p. 383.)

Hence, when, on account of the delay in the arrival

of the "Texas" cotton, Riss testifies that, as a matter of favor not of right, he obtained a loan of a corresponding number of bales from Scheuch and Company acting as merchants and importers of cotton, and when Scheuch testifies that he advanced the cotton out of his stock of spot cotton as a favor to a valued customer and to avoid claims against Steele, Miller and Company, they should be readily believed. And the advance or loan of the cotton becomes a matter which concerns only Chardin and Scheuch and Company and cuts no figure in this case. It, of course, does not discharge or affect in any way Steele, Miller and Company's obligations to Paul Chardin. We do not understand that any such claim is made by the trustee. It would be inconsistent with the allegations of the bill of complaint and with the nature of this suit, which is one to set aside a voidable transfer, not to recover a payment made in error. No one would be so foolish as to contend that Chardin had lost 1,000 bales of cotton by accepting an advance loan of cotton or that Scheuch and Company has lost 1,000 bales by making the loan, and that the bankrupts, by reason of this exchange of courtesies, had been presented with 1,000 bales.

In the event, that further particulars are desired in respect to the cotton purchases of Paul Chardin from Steele, Miller and Company, we call attention to the following:

By contracts made verbally with Linde in the Spring or Summer of 1909, followed by written confirmations through Scheuch and Company, Chardin arranged for the purchase of several thousand bales of cotton to be delivered gradually, all of the same grade of good

middling, g. c. The deliveries under these contracts aggregated from 1,000 to 2,000 bales for each of the months of November and December, 1909, and January, February and March, 1910. To provide cotton for such deliveries, Steele, Miller and Company, up to the time of their failure, had drawn against Chardin on account of the cotton so sold as follows—On October 4, 1909, for 1,000 bales—Contract cipher "Time"; on October 11, 1909, for 1,000 bales—Contract cipher "Billy"; on November 10, 1909, for 1,200 bales—Contract cipher "Hyatt"; on December 20, 1909, for 1,200 bales—Contract cipher "Fita"; on January 27, 1910, 1,000 bales—Contract cipher "Geof;" on March 24, 1910, for 600 bales—Contract cipher "Kaine." Of the above 6,000 bales the contracts have been performed except for the last mentioned 1,600 bales, 1,000 bales of which is involved in this suit and 600 bales have never turned up. Drafts for the value of the entire 1,600 bales have been drawn on Chardin and paid by him.

See answers of Chardin to Cross-Interrogatories 15 and 26.

The confirmation notes of Scheuch and Company in reference to the above contracts, in each contract one to Chardin and one to Steele, Miller and Company, were made Exhibits 4 to 13 of Scheuch's answer to interrogatory 31. Of these numbers 4 and 5 and 12 and 13, by stipulation between counsel, have been offered as types of the others. Steele, Miller and Company's confirmations are annexed to the same interrogatories as Exhibits 14 to 18, of which numbers 14 and 18 have been offered as types.

According to the testimony of Mr. Scheuch and Mr.

Riss, Steele, Miller and Company were to draw against Chardin only for cotton deliverable under these contracts, as Chardin was not doing a banking business, had no engagements d'importation with anyone, and authorized drafts only in payment of cotton purchased for his use. See previous quotations and references to the depositions of those witnesses and also Scheuch's answer to interrogatory 31. The drawing price was subject to be changed and definitely fixed during the month of delivery. On September 30, 1909, Scheuch and Company wrote to Steele, Miller and Company to try to arrange to draw on Westphalen and Company and Paul Chardin only against cotton which might be applied to their delivery contracts, and Steele, Miller and Company replied, November 29, 1909, that they thought that Scheuch and Company would be able to make deliveries to Chardin out of the cotton drawn on them. Scheuch's Exhibits 20 and 23, pp. 428 and 430. It is fair to presume that if the cotton drawn against had been shipped at the time of the drafts it would have sufficed to keep cotton on hand sufficient for the monthly deliveries. See Steele, Miller and Company's letter of November 10, 1909, Scheuch's Exhibit No. 22. The unforeseen fraud of Steele, Miller and Company prevented this and caused the borrowing from Scheuch and Company's stock of spot cotton. This borrowing was no more contemplated by Chardin than the fraud which necessitated it.

VII.

The Defense of Estoppel.

While the defense of estoppel in a suit to set aside a voidable preference, may not apply to acts of the bankrupts which constitute the alleged voidable transfer or to any fraud against general creditors participated in by the defendant, there is no reason why it should not be applied to any acts of the bankrupts which go back of the alleged voidable transfer and affect the nature of the original transactions and the rights and obligations arising therefrom. Nor is there any reason why estoppel should not prevail against a trustee in bankruptcy as to deception and fraud of the bankrupts which actually misled the creditor into an erroneous belief as to the nature or location of the property or of their rights, and the like.

As thus understood, what this Court said in *Lovell* v. *Newman and Son,* 192 Fed., 760-761, is applicable to this case, and is fully supported by the decisions of this Court therein cited.

And we may also rely upon the case of *Zartman* v. *First National Bank,* 216 U. S., 138, and claim that, if a trustee cannot treat the bankrupt's fraud as an asset, neither can he use such fraud as a weapon of attack. This has special reference to the monstrous proposition in connection with the use of duplicating bills of lading that, because the banks were not shrewd enough to escape being deceived by the deceptive explanations of Steele, Miller and Company, that should be used against them as a basis for imputing notice or knowledge. We say the trustee is estopped from denying the truth of the explanations given as to the nature and purpose of the

custody bills of lading, provided, of course, the banks, in good faith, believed the explanations.

The defense of estoppel was specially pleaded. We quote from paragraph 11 of the answer of the Bank of Mulhouse, as follows:

> "It avers that by the procuring or issuing of said alleged spurious through railroad bills of lading for said cotton and forwarding the same to it with said drafts attached and accepting the proceeds of said drafts Steele, Miller and Company warranted its title to said cotton and that the same had been delivered to the carrier for this defendant and is estopped to deny the same and is estopped to deny this defendant's right and title to the cotton after the same was selected, marked and appropriated as aforesaid, and this estoppel operates equally against the complainant trustee and the general creditors of Steele, Miller and Company and all other persons who are disputing this defendant's rights to said cotton."

We do not believe that this Court will get as far as the defense of estoppel. For this reason we shall content ourselves with the above reference to the reasoning and authorities found in *Lovell* v. *Newman and Son.*

It is believed that the authorities referred to will be found to fully support the two propositions: (1) that Steele, Miller and Company in the forged bills of lading impliedly warranted their title to the cotton marked as therein stated; therefore their subsequently acquired title enured to the benefit of the defendants, and (2) that Steele, Miller and Company and their trustee are estopped by the misrepresentations in the forged bills to deny that the bills were valid, or that the cotton was shipped as therein stated, or that the cotton in suit is the cotton there described.

We call attention also to the recent case of *Aldine Trust Co.* v. *Smith* (C. C. A.), 182 Fed., 449. The syllabus in that case correctly summarizes the facts and the conclusions of the Court as follows:

> "A bankrupt corporation, which had contracted as a sub-contractor to furnish and set tile in certain buildings under construction and had delivered the tile at the buildings, borrowed money from a trust company and as collateral security assigned the money 'due for material furnished' from the contractors. It also represented in good faith that the tile had been delivered to the contractors and that the money therefor was due it. Before the tile had been set, it became bankrupt, and its trustee claimed the tile, which were then sold to the contractors by agreement of the parties. *Held,* that, having obtained the loans on the representation that the tile had been sold, both the bankrupt and its trustee who took in its right were estopped in equity as against the trust company to claim the tile or their proceeds."

The *Aldine Trust Co. case* is fully supported by *Fourth Street Bank* v. *Yardley,* 165 U. S., 634, p. 653.

The doctrine of estoppel applied in the case of *Lovell* v. *Newman and Son* would have been just as applicable if custody bills of lading in that case had been mailed instead of being retained by the bankrupts. It is not claimed in either case that there was any fraud or collusion between the bankrupts and claimant at the time or in respect to the matters covered by the estoppel, *i. e.,* the issuance of the original bills of lading as genuine and the representations that the cotton was shipped at that time.

VIII.

Relations of Scheuch and Company With the Defendant Banks and With Steele, Miller and Company. Their Losses Due to Frauds of Steele, Miller and Company, etc.

We shall now discuss briefly the relations of Scheuch and Company with Steele, Miller and Company and with the defendant banks. As we understand the case, we do not believe it will be necessary for the court to examine very minutely into the nature of the business of Scheuch and Company; but, in order not to leave undiscussed any matter which may, in the course of the Court's consideration of the case, come to be important, we have concluded to discuss under this heading matters which, while covered by the evidence, have not heretofore been considered as of any importance.

Moreover, Scheuch and Company are defendants in this case, made defendants in order that their rights, if any, may be adjudicated upon. The trustee cannot recover unless he shows a right or title superior either to that of Scheuch and Company and that of the banks, *i. e.*, of both combined. While we believe that the banks' case is strong enough to stand alone, still if the rights of Scheuch and Company can aid in defeating the trustee's claim to the cotton, we propose to direct attention to those rights, so far as they enure to the benefit of the banks.

The nature of the business of Scheuch and Company and their relations with defendant banks are dealt with in the depositions of the directors of the Havre banks. We shall summarize the testimony of Mr. Dubois of the Societe Generale.

Scheuch and Company were a commercial firm at Havre organized in 1901 and engaged in the cotton business. They enjoyed an excellent reputation and were successful in business down to the failure of Steele, Miller and Company. They were accredited in 1909 with a capital of 700,000 francs. They conducted their business on two distinct lines, viz:

> 1st. "They acted as agents representing certain number of American export houses. As agents they tried to find in Havre buyers of cotton CIF for those houses, and in consequence they did not want any bankers for those transactions as they acted merely as intermediaries between the American sellers and the Havre buyers; only buyers have recourse to bankers.
>
> 2nd. "They acted as importers of cotton on their own account, and that quality, for their personal transactions they were obliged, as all other importers, to secure the help of one or more banks. Having had good results from this importing business, M. M. Scheuch and Company continued to increase their business on these lines from 1906 to 1910, in consequence their financial means increased likewise. They still continued their agency business as that brought them considerable profits" (p. 664).

The bank opened with Scheuch and Company credits for their importations the same as it did for other merchants in Havre. Against documents, bills of lading, insurance policy and invoice, for so many bales, marked so and so, the bank accepted sixty or ninety days drafts drawn by American exporters "for full value of the cotton mentioned." Scheuch and Company paid the bank five per cent. of the amount of the draft to cover it

against out-of-pocket expenses such as warehousing, insurance, etc., as might occur. On arrival of the steamers, the bank presented itself to the carrier as claimant of the cotton, made the customhouse entry therefor, and warehoused the cotton in its name. When the cotton was sold by Scheuch and Company, they paid over the money to the bank and received from it an order on the warehouse for the cotton. The bank gave its acceptance "only in exchange for full title deeds on the property." For protection against fall in price of the cotton future sales contracts were always booked in the name of the bank for an equal amount of bales as had been imported with its assistance. (Answer of Dubuis to Interrogatory 8, p. 666.)

The bank "was absolutely confident that the drafts accepted under the conditions conveyed to them the full property rights in the cotton described in the drafts and in the documents attached to these drafts," and but for such confidence in obtaining by such acceptance "the full right, possession and control of the cotton described," it would not have authorized or accepted the drafts. (Interrogatory 9.) The bank has no interest in or knowledge of the contract or arrangements of Scheuch and Company with cotton exporters. Havre merchants do not communicate such matters to their bankers. On principle the bank does not open credits for foreign exporters of cotton and has never intended to do so. It opens such credits only for merchants in Havre according to conditions settled with them separately. The arrangement with Scheuch and Company called for an accepting commission of ¼ per cent. on drafts accepted, and a further commission of five francs per fifty bales

monthly on future sales contracts. (Interrogatory 10.) The bank knew Steele, Miller and Company only by name and as one of the American firms exporting cotton to Havre. It never had anything to do with the firm or its members except to receive the usual advices of drawings. (Interrogatory 11.) It had no knowledge concerning the business relations or dealings between Scheuch and Company and Steele, Miller and Company. (Interrogatory 12.)

In 1910 Scheuch and Company lost largely through the failure of Steele, Miller and Company. The non-shipment of the 1,550 bales of cotton, representing 600,000 francs, absorbed nearly their whole capital. If to this is added the 2,494 bales of "Texas" cotton, Scheuch and Company are hopelessly ruined. (Interrogatory 27.)

The bank limited its acceptances for account of Scheuch and Company in the same way as it limits its acceptances for other clients. Scheuch and Company knew of these fixed limits, and always respected them. The bank never had occasion to make any observation on the point or to refuse any draft drawn for account of Scheuch and Company. In other words, the credit opened in favor of Scheuch and Company was never withdrawn or reduced. It stopped automatically when the limit was reached and opened again when cotton arrived and outstanding drafts were satisfied. (Cross-Interrogatories 13 and 17. See also testimony of Linde, page 242.)

It follows from the foregoing that the Havre banks dealt with Scheuch and Company and Scheuch and Company dealt with them, not as agents of Steele, Miller and

Company, but as merchant importers buying cotton from American exporters.

According to the deposition of Mr. Riss, Paul Chardin dealt with Scheuch and Company both as agent of Steele, Miller and Company, selling the latter's cotton, and as merchant importers of cotton having supplies of spot cotton of their own for sale. As a matter of fact the sale of the Steele, Miller and Company cotton with which we are concerned seems to have been arranged directly with Mr. Linde, the confirmatory notes only passing through Scheuch and Company. The extracts from Mr. Riss's testimony contained in the discussion in the case of Paul Chardin sufficiently disclose the relations of Chardin with Scheuch and Company.

In his deposition Mr. Scheuch says that Scheuch and Company started in 1901 with a capital of 50,000 francs and the business of the firm prospered and rapidly increased. They were the agents of many first rate American shippers of cotton, besides Steele, Miller and Company, a partial list of which is given. They did a commission business as agents or as merchants. They handled during the season of 1907-8 about 90,000 bales of cotton, during the season of 1908-9 about 155,000 bales, and during the season of 1909-10 about 130,000 bales. Their profits were left in the firm and its capital increased every year, so that the capital would have been about 1,000,000 francs in 1910, if the failure of Steele, Miller and Company had not occurred. As all their fortune was left in the firm, the members thereof have lost all they had and still owe large sums to the banks at Havre which extended them credit for their importations. (Interrogatory 2, pp. 340-1.)

Scheuch and Company did not sustain any substantial loss by the failure of Knight, Yancey and Company, but by the failure of Steele, Miller and Company they have lost at present over 1,400,000 francs, *i. e.*, their accumulated capital and about 700,000 francs besides. Mr. Scheuch says:

> "I call the special attention to this fact, because the testimony of Mr. Linde looks as if Scheuch and Company were not losing much by the failure of Steele, Miller and Company, which is a big mistake. Besides, it was impossible for Mr. Linde to give any approximate amounts concerning our losses, without having the accounts of all the dealings with Scheuch and Company in hands. I can only repeat that the firm of Scheuch and Company as well as Mr. Schilling and myself are completely ruined through the fraudulent practice of Steele, Miller and Company." (Interrogatory 3.)

Scheuch and Company first began to do business with Steele, Miller and Company in 1907. For the first two seasons they acted merely as selling agents, although they bought some cotton on their own account just as they did with all their American representatives. In the summer of 1909 Linde stated that his firm wished thereafter to do business on a consignment basis, and on a threat of Linde to establish a branch of Steele, Miller and Company at Havre, Scheuch and Company reluctantly consented to the change. This, of course, involved that Scheuch and Company should arrange in their own name and on their credit the necessary reimbursement credits with the Havre banks. What credits Scheuch and Company opened for themselves, the nature of the

arrangements, etc., have already been shown. (Interrogatory 4 and Interrogatory 5, pp. 342-5.)

The Bank of Mulhouse up to November, 1909, allowed 5,000 bales reimbursement credit, which was afterwards increased to 10,000 bales. The Societe Generale limited its reimbursement credits to 5,000 bales. That allowed by the Credit Havrais was increased at some time during the seasons of 1909-10 from 5,000 to 8,000 bales. The Comptoir d'Escompte de Mulhouse increased its limits during 1909-10 from 5,000 bales to 10,000 bales. (Interrogatory 6.) Steele, Miller and Company after September, 1909, until March, 1910, repeatedly wrote and cabled Scheuch and Company to increase their credit limits with the Havre banks, and when Linde was in Havre in January, 1910, he urged the same thing. (Interrogatory 11.) All this is not indicative of any intention or desire of Linde, who says he learned of the fraudulent practices of his firm in the fall of 1909, to protect or favor the Havre banks.

Throughout his testimony Mr. Linde refers to Scheuch and Company as the agents of Steele, Miller and Company; but neither the pleading nor the facts will permit the trustee to claim that Scheuch and Company occupy no other position than that of mere agents or employees of Steele, Miller and Company. Whether they are to be regarded as principals or as agents in any particular transaction depends upon the nature of the transaction. For instance, they were not acting as agents of anybody when they secured reimbursement credits with the banks. They were acting as agents of Steele, Miller and Company when they took part in the making of the sales contracts with Paul Chardin. They were acting as prin-

cipals when at different times they sold Paul Chardin spot cotton out of their own stock. They were acting as principals when they loaned Chardin cotton out of their own stock.

We now come to the misunderstanding between Scheuch and Company and Linde as to the taking up of drafts for 1,550 bales of cotton, the value of which was covered by drafts drawn on and accepted by the defendant Havre banks, but which was never shipped to them, and also to the 600 bales of cotton in respect to which Chardin was victimized as late as March, 1910. Mr. Linde's only reason for stating that the drafts for the 1,550 bales had been taken up was a statement from Scheuch and Company's office on which the drafts were referred to as "paid." Mr. Scheuch says that "paid" was a clerical error for "accepted." He further states with particularity and detail, in his answer to interrogatory 28, that these drafts were never paid for the very good reason that Scheuch and Company did not have on April 29, 1910, the very large sum, 600,000 francs, necessary to take up the drafts, nor did they have the cotton, which was never shipped. Scheuch and Company has annexed as Exhibit 3 a detailed account of their business with Steele, Miller and Company, covering some 43 pages, which shows that no such payments were made or could have been made. (See also their answer to cross-interrogatory 20.)

The 1,550 bales, which have nothing whatever to do with the "Texas" cotton involved in this suit, represent the losses the Havre banks have sustained in addition to the "Texas" cotton. In addition there are the 600 bales drawn for on Chardin which never reached him

and which represent a loss to that amount in addition to the cotton claimed by him in this litigation. The 1,550 bales are made up as follows:

350 bales drawn for on the Bank of Mulhouse.

1,000 bales drawn for on the Comptoir d'Escompte de Mulhouse.

200 bales drawn for on the Societe Generale.

Mr. Lysell, for the Bank of Mulhouse, Mr. Level, for the Comptoir d'Escompte de Mulhouse, and Mr. Dubois for the Societe Generale, all declare that the drafts were not taken up and the transaction represents so much dead loss to the banks. It will thus be seen that when these banks recover the "Texas" cotton now claimed by them, they will still be heavy losers by the frauds of Steele, Miller and Company.

Scheuch and Company never had any engagements d'importation with Paul Chardin. The firm's dealings with Chardin consisted either of sales to him by the firm as agents of American shippers or of sales to him by the firm as Havre merchants out of their stock of spot cotton (Interrogatory 30 and Cross-Interrogatory 9).

We ask that the judgment appealed from be affirmed.

Respectfully submitted,

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